This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

LBC
JRP
FG
v. 2

CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

4° & 5° VICTORIÆ,

SESSION OF PARLIAMENT 1841.

VOL. II.

REPORTED BY

GEORGE ROBINSON, ESQ.

BARRISTER AT LAW.

By Appointment of the House of Lords.

WILLIAM BLACKWOOD AND SONS, EDINBURGH;
SAUNDERS AND BENNING, LONDON.

1842.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

a.56266

JUL 15 1901

INDEX OF NAMES.

Page.

Allan *v.* M'Craw, ... 507
Anstruther, Cairns *v.* 29

Bell *v.* Mylne and others, ... 286
Breadalbane, Marquis of, *v.* Campbell, ... 109

Cairns *v.* Anstruther, ... 29
Campbell, Breadalbane, Marquis of, *v.* 109
Casamaijor and others *v.* Pearson and others, . . . 217
Christie and others, Royal Bank of Scotland *v.* . . . 118
Cochrane, Craig *v.* 446
Craig *v.* Cochrane, ... 446
Curle and another, Scott *v.* 317

Dill *v.* Haddington, Earl of, and others, ... 298
Dixon and others *v.* Dixon and another, ... 1
Dixon *v.* Fisher and another, ... 345
Dunlop and others, Todd *v.* 333

Fergusson *v.* Fyffe, ... 367
Fisher and another, Dixon *v.* 345
Fogo *v.* Mathie, ... 441
Fyffe, Fergusson *v.* 367

Gordon *v.* Graham, ... 251
Graham, Gordon *v.* 251

Haddington, Earl of, and others, Dill *v.* 298
Hill and others *v.* Paul and another, ... 524
Home and another *v.* Pringle and others, . . . 384

Irvine *v.* Kirkpatrick, ... 475

Kirkpatrick, Irvine *v.* 475

Laidlaw *v.* Smith, ... 490

Page.
M'Craw and others, Allen *v.* 507
Mathie, Fogo *v.* 441
Melville and others, Preston *v.* 45
Melville and others, Preston *v.* 88
Menzies, Stewart *v.* 547
Mylne and others, Bell *v.* 286

Paul and another, Hill and others *v.* 524
Pearson and others, Casamaijor and others *v.* . . . 217
Preston *v.* Melville and others, ... 45
Preston *v.* Melville and others, ... 88
Pringle and others, Home and another *v.* . . . 384

Royal Bank of Scotland *v.* Christie and others, . . 118

Scott *v.* Curle and another, ... 317
Smith *v.* Laidlaw, ... 490
Stewart *v.* Menzies, ... 547

Todd *v.* Dunlop and others, ... 333

INDEX OF MATTERS.

ACCOUNT.

A party resident in India opened an account with a mercantile company as his agents at Calcutta, in 1786; the party was non compos mentis in 1793, and continued so till his death in 1810. In 1812, a partner of the company, then in Great Britain, rendered to a relative of the deceased party an account, embracing a long term of years, and balanced annually on the 30th of April, down to the 30th of April, 1810. The company, at the close of each year, debited themselves with Indian interest, and carried forward the balance, composed of principal and interest, (under deduction of 1 per cent for commission,) as one sum bearing Indian interest in the next year. The balance thereby exhibited against the company was 17,346 sicca rupees. A docquet was subjoined, to the effect that the balance was to bear interest at 9 per cent. A letter from the said partner accompanied the account, and acknowledged the above balance. No representation was taken out to the party's estate till 1835; but in 1833, certain parties, as his alleged representatives, raised an action in the Court of Session, for the amount of the account rendered, with interest at 9 per cent; and in 1835, raised a supplementary action, concluding for compound interest on the account rendered, against a partner of the company resident in Scotland, and who had, in 1820, retired from the company, which had since been dissolved. Held, (affirming the judgment of the Court of Session,) 1st, That the defender was bound by the account so rendered, and was liable for the amount of the sums therein charged; 2d, That he was chargeable also with interest on the said amount, at the rate of 9 per cent per annum, from the 30th of April, 1810, to the date of the final decree to be made in the action. But held, 3d, (reversing the judgment of the Court of Session,) That in calculating interest on the said amount, compound interest, or annual rests, ought not to be allowed. Fergusson v. Fyffe, . . page 267

ACCRETION. See *Titles.*

AMENDMENT OF THE LIBEL.

In a summons for damages for the alleged illegal and malicious use of a Sheriff's process-caption, it was stated *narrativé*, that the writ "was under the hand of the Sheriff Clerk," and that the whole proceedings were illegal, &c.; Held, (affirming the judgment of the Court of Session, dismissing the action,) That, although the record was not closed, an amendment of the summons ought not to be allowed, to the effect that the said "caption was not issued by the Sheriff, nor was it the extract "of any warrant duly signed by him," except on payment of the previous expenses. Scott v. Curle, . page 318

ANNUITANT. See *Legacy*.

APPARENT HEIR.

A company having granted to a bank, in security of a cash credit, a bond and disposition in security, whereby, in addition to the obligations on the company, and the individual partners thereof, two landed estates, in which one of these partners was infeft as ex facie absolute proprietor, were conveyed to the bank; and within a year after the death of that partner, a second bond and disposition in security having been granted, in consideration of an advance by the bank, whereby the eldest son and apparent heir of the deceased partner conveyed the same estates to the bank, in security of that advance, and in corroboration of the first bond. Held, (affirming the judgment of the Court of Session, proceeding on the opinion of a majority of the whole Judges,) 1st, That these estates were, in the circumstances, the private property of the deceased partner, and were not held in trust by him for the firm in which he was a partner; 2d, That by the death of the partner, the firm, as it had up to that period existed, was dissolved, so far as it affected the bank, notwithstanding any special agreement between the partners, that the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of the partner deceased; 3d, That the first bond and disposition in security having been given by the deceased partner to the bank to secure repayment of advances made to the firm in which he was a partner, could not be used as a security for advances made after his death, to a firm in which he was not a partner; 4th, That the cash credit having been operated upon subsequently to the death of the partner, in the same manner, and by the same continuing firm, as before, and the account being kept by the bank as a continuous account, a balance standing against that firm at the partner's death, was extinguished by subsequent payments made by the surviving partners, and could not again be reared up in consequence of later drafts upon it to a greater amount; And, therefore, 5th, That the second bond and disposition in security over the said estate, by the son and appa-

APPARENT HEIR — *continued.*

rent heir of the partner, was null and void under the act 1661, cap. 24, in respect that the same was granted within a year of his father's death, not to a creditor of his father, in security of any debts due by the father, but for the purpose of providing a credit for the apparent heir himself, and securing a debt of his own upon property derived by him from his father. Royal Bank of Scotland v. Christie, page 118

Observed per LORD CHANCELLOR. — "The question, whether, under the statute 1661, cap. 24, an apparent heir can, within a year of his ancestor's death, effectually prefer one of the ancestor's creditors to another, by giving him a security upon the ancestor's estate? does not, in the circumstances of the present case, arise." S. C.

ARRESTMENT.

If facts shew, that an arrestee could not, when he paid his creditor, have been cognizant of the arrestment having been used in his hands, he will not be liable to make second payment to the arrestor. Laidlaw v. Smith, . 490

ASSIGNATION.

Question raised,—Whether a landlord is bound to assign to the agent of his tenant, whose crop was under sequestration, his right of hypothec, on the agent tendering payment of the rent. Gordon v. Graham, . . . 252

BILL OF EXCEPTIONS.

At the trial of an issue,—Whether the defender wrongfully failed to relieve the pursuers' crop and stock from sequestration, by which it was then attached?—the Judge directed the jury in point of law, that "the tenders of the arrears of rent "having been made by the pursuers' agent, in terms of his "letters of the 18th and 24th of May, 1833, and the sequestration not having been withdrawn until the 28th of that "month, the said sequestration ought to have been withdrawn "after these offers, and more especially after that of the "24th of May; and that the defender was, in point of law, "responsible to the pursuers for not withdrawing the sequestration, quoad the sums contained in these tenders." The defender excepted to this direction. The Court of Session, without concurring in the opinion in point of law so stated to the jury, disallowed the bill of exceptions, on the ground, that in the special circumstances of the case, the direction was right. Judgment of the Court of Session, disallowing the bill of exceptions, reversed, and cause remitted back to allow the bill of exceptions, and grant a new trial. Gordon v. Graham, 251

Per LORD CHANCELLOR. — The only matter raised by the exception was the abstract question of law, and the Court could not travel out of the exception. The circumstances were exclusively for the consideration of the jury. S. C.

CLAUSE. See *Provision to Wife.*

CLAUSE. See *Deed*, 2.

COMPETITION. See *Legacy.*

CONDITIO SI SINE LIBERIS DECESSERIT. See *Provision to Children.*

COSTS.

1. The House of Lords will not allow an appeal in respect of costs. Scott v. Curle, . . . page 319
2. Though affirming judgment, the House of Lords will not meddle with costs below, although the question may have been brought up by cross appeal. Home v. Pringle, . 384
3. Should always follow the judgment in affirmance. Stewart v. Menzies, ... 547

DEED.

1. Under a general conveyance in trust for creditors, of all "means and estate presently belonging to me," with clauses suited to such a conveyance, *held*, that the future fees of a public office enjoyed by the granter, which was not in any way alluded to in the deed, were not carried by it. Hill v. Paul, ... 524
2. A clause in a conveyance in trust for creditors, binding the granter to execute such "farther deeds as may be judged "necessary for more effectually carrying the purposes of the "present trust into full execution," is for farther assurance only of that which is *de facto* conveyed, and will not oblige the granter to execute a farther conveyance of other estate. S. C.

DOMICILE. See *Jurisdiction*, 1.

ENTAIL.

1. A party executed a general disposition of his whole heritage to trustees. The deed contained no procuratory or precept; but it surrogated the trustees in the room of the grantor, and bound his heirs to make up titles and convey to the trustees. The same party also executed an entail of part of his lands, in which he was infeft in fee simple, containing procuratory and precept. The entail was so conceived as to be a mere burden on the trust-right, and was declared to be in abeyance during the trust, except to certain special effects, one of which was the entering of vassals. On the party's death, the first heir of entail was regularly infeft as heir of entail before the trustees made up any title:—Held, in an action of adjudication and implement at the instance of the trustees, and upon the objection of the aforesaid heir of entail, (affirming the judgment of the Court of Session,) 1st, That the trustees

ENTAIL — *continued.*

were entitled to make up a feudal title to the whole lands, including those contained in the entail, and to a decree of declarator that they were so entitled, and, if necessary, to adjudge in implement of the trust-disposition, and ordaining the heir-at-law of the truster to make up titles and convey the whole lands to the trustees, in order that the full right of the same might be vested in them, according to the true meaning of the trust-disposition; but without prejudice to the rights or interest of any party in the said lands. And, 2d, observed per Lord Chancellor, "That independently of there "being a sufficient legal answer to the objection, the said "heir of entail could not be permitted thus to frustrate the "intentions of the truster, and defeat the estate which he "intended his trustees to hold for the benefit of the trust." Preston v. V. Melville, . . . page 45

2. The prohibitory and resolutive clauses of a deed of entail were directed against the institute nominatim and the heirs succeeding to the lands. The resolutive clause was thus introduced: "And with and under this irritancy," &c.; and the irritant clause, which followed, and was alleged by the party enforcing the entail, to form part of the resolutive, was thus expressed: "And upon every contravention which may "happen by and through any of the heirs succeeding to the "said lands, their failing to perform all or each of the condi- "tions," &c. "or acting contrary to all or any of the limita- "tions," &c. "it is expressly provided, not only that the "lands shall not be burdened with, or liable to, the debts "and deeds, crimes and acts, of the heirs contravening," &c. "but also all debts contracted, deeds granted, and acts done, "contrary to the conditions hereof," &c. "shall be of no "force, strength, or effect, and ineffectual and unavailable "against the other heirs:"—Held, (affirming the judgment of the Court of Session,) that the irritant clause did not apply to or fetter the institute, and that a sale of the lands by him was effectual. Breadalbane v. Campbell, . . 109

3. A provision in an entail, declaring that the estate should not be affected, &c. by the debts or deeds, legal or voluntary, of the institute or heirs of entail, held, with reference to the context, not to import an effectual irritancy of sales. S. C.

EXPENSES. See *Mandatary.*

FIAR AND LIFERENTER.

A superior uninfeft may competently dispone the superiority in liferent, with power to the disponee to enter vassals; and an entry by the liferenter, given in exercise of the power, will be valid and effectual. Craig v. Cochrane, . 446

FOREIGN. See *Account.*

FOREIGN. See *Jurisdiction.*

HUSBAND AND WIFE.
Dealings by a widow, in regard to the estate of her husband, held to amount to acceptance by her of provisions made to her by the husband, and to bar her from claiming jus relictæ. Dixon v. Fisher, ... page 345

INSTITUTE. See *Entail*, 2.

INTEREST, ACCUMULATION OF, See *Account.*

INVESTITURE BY TRUSTEES. See *Entail*, 1.

IRRITANT CLAUSE. See *Entail*, 2.

JURISDICTION.
1. Observed per LORD CHANCELLOR.—"The domicile of a deceased party regulates the right of succession to his moveable property; but the administration must be in the country in which possession of his property is taken, and held under lawful authority." Preston v. V. Melville, 89
2. Found, that the Court of Session had jurisdiction, ratione contractus, over an heiress-portioner, liable for the debts of her ancestor upon the passive titles, as served to a Scotch estate though for the purpose merely of conveying it away, and as possessed of the mid-superiority of the lands, without regard to whether she had been forty days within Scotland at the time of her personal citation. Irvine v. Kirkpatrick, 475

JURY TRIAL. See *Process*, 4.

JUS RELICTÆ. See *Husband and Wife.*
A widow having, by dealings with her husband's executor, renounced her claim to jus relictæ, cannot, as against one of his children, recall the renunciation, so as to affect the child's legitim. Dixon v. Fisher, . . . 345

JUS SUPERVENIENS. See *Titles.*

LANDLORD AND TENANT. See *Bill of Exceptions.*

LEGACY. See *Provision to Children.*
Terms of a trust-settlement, where Held in the circumstances, (reversing in part, interlocutors of the Court of Session.) 1st, That two annuitants were respectively entitled to payment of the full amount of their annuities, only in so far as the free annual proceeds of the trust fund, during the year for which such annuities were payable, were sufficient for the payment thereof; but that when, in any one year, the free pro-

LEGACY — *continued.*

ceeds exceeded in amount the said two annuities, such excess belonged, and became divisible, among the residuary legatees; 2d, That upon the death of one of the two annuitants, one-half of the capital of the trust-fund became divisible among the residuary legatees; and 3d, That from and after the death of such annuitant, the other annuitant was entitled to the free income in each year of only one-half of the capital of the trust-fund; but in any one year when such income exceeded the amount of her annuity, such excess should belong to the residuary legatees. Casamaijor v. Pearson, page 217

LEGITIM. See *Jus Relictæ.*

MANDATARY.

The mandatary of a foreign pursuer applied to be relieved from the situation of mandatary. The usual intimation was duly ordered by the Court, calling on the pursuer to sist another mandatary before farther procedure. An impression at this stage of the proceedings arose, originating in a commu·ication from the defender's agents, and adopted by the mandatary, that the pursuer was dead. The defender moved, that the mandatary be found liable in the expenses of process hitherto incurred. No proceeding was taken for intimating the process to the representatives of the pursuer. The Court found the mandatary liable in these expenses: — Held, 1st, That the mandatary was liable to decree for the expenses up to the date of his application to be discharged; but, 2d, That the proper form of proceeding on the supposition that the pursuer was dead, would have been to have ordered intimation of the process to the representatives of the pursuer; and in the event of their declining to go on with the action, then to have decerned against the mandatary for the expenses. It having been stated to the House, however, by the counsel for the mandatary, at the hearing of the appeal, that it was discovered, that the pursuer was still alive, judgment of the Court of Session affirmed, on the ground that the proceedings calling on the pursuer to sist a new mandatary were admitted to be regular; and that the result of any remit to the Court would necessarily be the pronouncing of an order precisely the same as that complained of. Cairns v. Anstruther, 29

MARRIAGE. See *Proof*, 1, 2.

1. Promise of marriage, on condition of a future event, excludes application of the fiction, that consent de presenti was given at the moment of copula. Stewart v. Menzies, 547
2. A declaration of marriage, "in the event of a child" being born of an existing connection, cannot receive effect to constitute marriage, though the condition should be purified. S. C.

MOVEABLE SUCCESSION, ADMINISTRATION OF,

Certain parties, named trustees as well as executors of the will of a domiciled Scotsman, having declined to accept, the Court of Session, with consent of parties next of kin, appointed other trustees, with all the powers given or competent to the original trustees. Previous to such appointment, one of the next of kin, a domiciled Scotchwoman, obtained letters of administration of the moveable estate in England, from the Prerogative Court of Canterbury, and found caution there for the due execution of the office. She filed a bill in Chancery in England, praying to have the usual decree for taking the accounts, and administration of the personal estate, and that the residue might be invested for the benefit of the parties interested. The trustees then raised an action against this administratrix before the Court of Session in Scotland, concluding for declarator, that all the property and estate which belonged to the testator at his death, wherever situated, in Scotland, England, or elsewhere, and, in particular, the funds and effects held by the administratrix under the foresaid letters of administration, now pertain and belong to, and ought to be vested in, and transferred to them, as trustees as aforesaid; and the Court having decerned to that effect, judgment of the Court of Session reversed, and cause remitted back, with a declaration, — that the property of the truster in England ought to be administered by the said administratrix by virtue of the letters of administration granted by the Prerogative Court of Canterbury. Preston v. Melville, page 88

PACTUM ILLICITUM.

That an assignment by a keeper of a register of sasines, of the fees of his office in trust for his creditors, would be illegal. Hill v. Paul, ... 524

PASSIVE TITLES.

Service by heiresses-portioners for the purpose of conveying Scotch estate to trustees in implement of the marriage-settlement of one of the heiresses, in which settlement the ancestor had bound himself to provide the particular heiress in one-third part of his whole property, (power of disposal during his life, and to charge with legacies, being reserved by him, and conveyance accordingly,) was such a representation as would subject the heiresses in liability for the ancestor's debts; the other heiresses having, under the will of the ancestor, taken the other two-thirds of his property, which was situated in England, on condition of making the conveyance in implement. Irvine v. Kirkpatrick, . 475

PLEADING.

A practice of partially setting out in the pleadings a document containing the substance of a contract, and suppressing mate-

PLEADING — *continued.*
rial parts of it animadverted on, (see page 293.) Bell v. Mylne, ... page 286

POWER OF COURT TO APPOINT TRUSTEES.
Question. The trustees named by the truster refused to accept. On the application, and with the express consent of parties interested in the succession, the Court appointed trustees, with the whole power and privileges of those named by the truster; one of the parties so consenting afterwards objected, that the Court had no power to make such appointment. Held unnecessary to be decided, as the appointment stood in full force, having been with the consent of the party objecting. Preston v. V. Melville, . . 46

PRACTICE.
A. S. 11th July, 1828, §. 65 — Stat. 6 Geo. IV. c. 120 — 55 Geo. III. c. 42 — 59 Geo. III. c. 35 — 1 Will. IV. c. 49. In an action of damages by a schoolmaster against trustees of a private institution for alleged illegal dismission, the cause was retransmitted from the jury roll to the Court of Session, for the purpose of determining points of law or relevancy occurring previous to trial; and the Lord Ordinary, in terms of sect. 65 of A. S. 11th July, 1828, reported the cause on cases, the record being still unclosed. Held, that the Court being satisfied that the pursuer had no relevant ground for damages, had rightly dismissed the action de plano. Bell v. Mylne, ... 286

PRACTICE IN BILL CHAMBER. See *Proof.*
A. S. 14th June, 1799. Question, as to the regularity of a certificate, that letters of advocation had not been expede, the bill having been passed on the 13th of August; the certificate bearing, that from the 22d of August, till the 3d of September, inclusive, no such letters had passed the Signet. Scott v. Curle, ... 318

PROCESS.
1. A. S. 17th January, 1797 — A. S. 14th June, 1799 — A. S. 11th July, 1828 — A. S. (Sheriff Courts,) 11th July, 1828, c. 19, sect. 4. In advocation from a Sheriff Court, the bill was passed, but the advocator did not expede the letters till after the expiry of ten days. The opposite parties obtained a certificate of that fact from the Signet Office. The advocator, who had borrowed the process from the sheriff clerk, on a receipt to return the same on demand, delayed returning it to the clerk, and thereafter expede letters of advocation, which he called in Court, and placed the process in the hands of the clerk to the advocation in the Court of Session. The Lord Ordinary, the Court adhering, dismissed the advo-

PROCESS — *continued.*

cation. The advocator having been imprisoned under a Sheriff's process-caption, obtained upon the application of the opposite parties, brought an action of damages against them. Held, assuming the certificate to have been regular, (affirming the judgment of the Court of Session dismissing the action,) 1st, That in consequence of the letters of advocation not having been duly expede, there was no depending process in the Court of Session; 2d, That the party advocator was bound to have returned the Inferior Court process to the sheriff clerk, to be by him transmitted to the clerk of the bills, it being observed by the Lord Chancellor, that a party borrowing a process in a Sheriff Court, on a receipt to return the same on demand, and depositing it in the Court of Session, cannot be permitted to plead the possession of the Court of Session, as a reason why he should not obey the order of the proper Court. Scott v. Curle, page 317

2. No objection for want of parties, that in an action on the passive titles, against heiresses portioners, served for the purpose of making a conveyance in implement of obligations upon the ancestor, and in fulfilment of his will, the trustees of the will, who were resident in England, had not been called. Irvine v. Kirkpatrick, . . . 475
3. If a party allow judgment to be made upon statements not contradicted by him, he cannot, upon appeal, ask issue as to their truth. Laidlaw v. Smith, . . . 490
4. Where a record has been made up, and evidence taken before the Commissaries, with a view to declarator of marriage, an alternative conclusion for damages for seduction ought not to be remitted for trial by jury. Stewart v. Menzies, 547

PROOF.

1. It is competent to prove by parole, the circumstances under which, and the intention with which, a letter was written and delivered, to the effect of negativing its having been intended to form a contract of marriage, which its terms, without such evidence, might have imported. Stewart v. Menzies, ... 547
2. Circumstances in which the evidence of relations was held to have been properly excluded. S. C.

PROPERTY.

1. Held, (affirming the judgment of the Court of Session,) that a party whose predecessor obtained from a corporation a feu right to land adjacent to, and described in his feu contract as bounded on the north by a public river, has no right of property in ground afterwards gained from the channel of the river by the operations of the corporation, as trustees in improving the navigation of the said river. Todd v. Dunlop, ... 333

PROPERTY — *continued.*

2. Observed per LORD CHANCELLOR. — The case is ruled by that of Smart v. Magistrates of Dundee, affirmed by the House of Lords, 22d November, 1797, (8 Brown's P. C. 119,) "where it was held, that where the sea flood is stated as the boundary of premises granted on the shore of a sea port, being an incorporated burgh, this does not give the grantee a right to follow the sea, or to land acquired from it, or left by it where it has receded, in prejudice to the corporation having a right vested in them to the whole territory of the burgh. S. C.

PROVISION TO CHILDREN.

A testator left a mortis causa settlement for the distribution of his whole heritable and moveable estate, containing provision to his several children; in some instances the provision being payable to the particular child nominatim, in other instances to the child, and to his or her heirs; the testator left the residue of his estate to his eldest son nominatim, without mention of his heirs, although he was in the knowledge that the eldest son had children living; the eldest son predeceased the testator. Held, in a question betwixt the youngest children of the testator, and the children of the eldest son, (affirming the judgment of the Court of Session,) that the provision in favour of the eldest son did not lapse, or fall to the heirs ab intestato of the father, by the eldest son predeceasing the father. Dixon v. Dixon, . page 1

PROVISION TO WIFE.

Terms of a postnuptial contract, upon the construction of which, Held, (reversing the interlocutor of the Court of Session,) that a provision of a sum of money by the husband, imported a gift to the wife, and became vested in her as her absolute property upon her surviving her husband, and there being no issue of the marriage. Dill v. Haddington, 298

PUBLIC OFFICER. See *Pactum Illicitum.*

RESIDUARY LEGATEE. See *Legacy.*

SCHOOLMASTER.

Held, (affirming the judgment of the Court of Session,) that the trustees of a school established by private charity, having the choice of the teachers, have a power of dismissing them at pleasure. Bell v. Mylne, . . . page 287

SEDUCTION.

What held not to amount to proof of. Stewart v. Menzies, 547

SEQUESTRATION. See *Bill of Exception and Assignation.*

SERVICE OF HEIRS.
Proceedings in a service held to shew that it was expede by the party, as an heir of entail, and not of line merely. Craig v. Cochrane, ... page 446

SHERIFF'S PROCESS-CAPTION. See *Process*, 1.

STATUTE, CONSTRUCTION OF. Allan v. M'Craw, . 507

SUPERIOR AND VASSAL. See *Fiar and Liferenter.*
The title of a vassal made up by entry with the party, appearing by his infeftment upon the record to be the superior, will not be affected by any defect in the title of such superior, as in a question between the vassal and other parties claiming the dominium utile, as never having been vested in the vassal, in respect of such defect in the superior's title,—more especially if the vassal have charged all parties to enter as superior, and none appeared to challenge the entry of the party with whom he entered. Craig v. Cochrane, . . . 446

TESTAMENT. See *Legacy.*

TITLES. See also *Superior and Vassal.*
Decree at the instance of a superior reducing an infeftment taken upon a precept in a crown charter, as in contravention of an entail, and declaring the infeftment of the party pursuer, taken upon the same precept, as the only good title, will draw back to validate a precept of clare constat, previously given by the pursuer, and the vassal's infeftment upon it. Craig v. Cochrane, ... 446

TRUST. See *Entail.*
The appointment by trustees of one of their number to be factor to the trust, is not a breach of trust, so as *per se* to make those appointing liable for the acts of the factor, as if the acts of a co-trustee, for which they would be liable; but will infer against those appointing a liability for the acts, as if those of their agent. Home v. Pringle, . 384
The mere fact of trustees allowing balances to remain in the hands of their factor at the annual settlement of his accounts, where there must necessarily have been current accounts between the trust and third parties, without any knowledge by the trustees of fraud, in contriving that the balances should be greater than necessary, will not infer against the trustees liability for the balance owing by the factor at the ultimate settlement. S. C.
General dealing between trustees and their factor *held* not

TRUST — *continued.*

to infer a liability by them for the balance upon the factor's accounts, lost to the trust by the factor's bankruptcy. S. C.

A trustee does not, by accepting the office of cashier to the trust, incur any liability, in regard to the management of the trust, beyond that to which he was already subject *qua* trustee. S. C.

Trustees ought not to have any allowance or salary in respect of offices held by them under the trust; but circumstances under which the House of Lords refused to disturb accounts, in which such allowances had been passed. S. C.

VESTING. See *Provision to Wife.*

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1841.

[*9th February* 1841.]

ANTHONY DIXON and others, Appellants.[1] (No. 1.)

[*Sir W. Follett.*]

ELIZABETH DIXON, Daughter of the deceased Jacob Dixon junior, and her Curator, Respondents.

[*S. S. Bell.*]

Provision to Children — Legacy — Conditio si sine liberis decesserit. — A testator left a mortis causâ settlement for the distribution of his whole heritable and moveable estate, containing provisions to his several children; in some instances the provision being payable to the particular child nominatim, in other instances to the child and to his or her heirs; the testator left the residue of his estate to his eldest son nominatim, without mention of his heirs, although he was in the knowledge that the eldest son had children living; the eldest son predeceased the testator: — Held, in a question betwixt the younger children of the testator and the children of the eldest son

---

[1] 14 D., B., & M., 938; Fac. Coll., 10th June 1836.

(affirming the judgment of the Court of Session), that the provision in favour of the testator's eldest son did not lapse, or fall to the heirs ab intestato of the father, by the eldest son predeceasing his father.

2d Division.

Lord Ordinary Jeffrey.

Statement.

JACOB Dixon senior, of the Dumbarton Glass Work Company, by a general trust disposition dated in November 1824, conveyed his whole heritable and moveable property to trustees, for the payment, first, of his debts, and, secondly, of the following provisions to his children; viz. "To Anthony Dixon, my second lawful son in life, "and the heirs of his body, the sum of 2,800*l.*, which, "with 1,200*l.* which I have already paid and advanced "for my said son, for outfitting him and putting him "in business, make up the sum of 4,000*l.* sterling, "which I intend to be the amount of his provision as "one of my children:" Further, "To Joseph Dixon, "my third lawful son now in life, and to the heirs of "his body, the sum of 1,500*l.*, which, with the sum of "2,500*l.*, already advanced to him or paid by me on "his account, makes up the sum of 4,000*l.* sterling, "which I intend to be the amount of his provision as "one of my children:" Further, "To Elizabeth "Dixon, my eldest lawful daughter, spouse of the "Rev. William Jaffray, minister of the gospel at Dum-"barton, and to the heirs of her body, the sum of "1,500*l.* sterling, which, with the sum of 1,500*l.* which "I have already paid and advanced to my said daughter "and her said husband, makes up the sum of 3,000*l.*, "which I intend to be the amount of her provision as "one of my children:"

Also, "To Louisa Dixon, my second lawful daughter, "the sum of 3,000*l.* sterling, and to Catharine Ann

" Sophia Dixon, my youngest lawful daughter, the like " sum of 3,000*l.* sterling."

Then followed a bequest to the testator's eldest son, to the following effect: " I appoint my said trustees to " convey, deliver, and make over to Jacob Dixon, my " eldest lawful son, the residue of my said means and " estate, after satisfying the provisions and others above " mentioned; and that as soon after my death as my " said trustees may have recovered and laid aside sums " sufficient for satisfying the provisions, annuities, and " others provided by this deed, and the relative sup- " plementary deed before mentioned, care being always " taken that my said eldest lawful son shall not receive " less, out of my means and estate, than the sum of " 6,000*l.* sterling or the value thereof; which provisions " so to be paid to my said children shall be accepted by " them, and the same are hereby declared to be in full " of all legitim, portion natural, bairns part of gear, " share of goods in communion, executry, and others " whatsoever, which they or any of them can ask or " demand by and through my death, or the death of " their deceased mother; declaring, that if any of my " said children shall quarrel or attempt to impugn this " deed of settlement, or the relative supplementary " deed before referred to, by process of reduction or " otherwise, upon any ground whatever, then it is my " will, and I hereby declare, that such child or children " shall amit, lose, and forfeit all rights, claim, or interest " which he, she, or they would otherwise have under " the trust-deed and settlement; and in that event, I " hereby recal the provision or provisions made by me " in favour of such child or children."

Previous to the making of that settlement the testator

DIXON and others v. DIXON and another.

9th Feb. 1841.

Statement.

had allotted to his eldest son, Jacob Dixon junior, a fourth share or interest in the stock of the Glass Work Company, without the son making any advance, and on which stock Jacob Dixon junior, as was alleged, realized considerable profits. Jacob Dixon junior had also, with the father's knowledge, legitimatized certain children by a marriage with the mother, who was of inferior rank in life. The terms on which the testator and his son stood in respect to treatment or recognition of these grandchildren were disputed, but the testator's knowledge of the existence of such grandchildren was admitted.

Jacob Dixon junior died on the 25th September 1831, predeceasing the testator, who died the day following. The other children survived their father. The accepting and acting trustees under the settlement were the testator's sons, Anthony and Joseph Dixon.

Thereafter, Anthony Dixon, and, with the exception of Mrs. Jaffray, the other children of the testator, as four of the nearest of kin, raised an action against the widow and children of Jacob Dixon junior, the residuary legatee under the settlement, setting forth the provisions of the deed, the state of the family of Jacob Dixon junior, and his predeceasing his father, and concluding to have it found and declared that the residuary legacy in favour of Jacob Dixon junior lapsed and became void by his predeceasing the testator, and did not transmit to his children, but that Jacob Dixon senior died intestate quoad the succession to the free residue of his estate, which residue the trustees were bound to make over to the pursuers, as his legal executors and nearest of kin.

Among other defences it was pleaded that the provision in favour of Jacob Dixon junior did not lapse by his predeceasing the testator, but implied a conditional institution in favour of his children, and that the defenders were entitled to claim the said provision.

The Lord Ordinary, after hearing parties on the closed record, pronounced, 24th February 1836, the following interlocutor, adding thereto the subjoined note: [1]

"The Lord Ordinary having resumed consideration "of the debate, with the closed record and whole

[1] "*Note.*—Holding the conditio si sine liberis to depend on the præ- "sumpta voluntas of the testator, there probably have been few cases "where, on the whole matter, there were so strong reasons for applying "it as the present. The only circumstances which could give a colour "to the claim of the pursuers, are, 1st. That the father was aware, when "he made his settlement, that his eldest son had children; and 2d. "That, in providing for such of his other children as had issue, he has "expressly called the heirs of their bodies as conditional institutes, but "left his provision to the eldest son individually, and without any such "addition. In an ordinary case, these circumstances might be of "moment, and it is with a view to obviate their effect that the Lord "Ordinary has brought into notice the other circumstances which are "stated in the body of his judgment; and taking them all together, as "elements in the complex question as to the real or presumed will of the "testator, he thinks it cannot be reasonably doubted how that question "should be decided.

"The existence of children at the date of the settlement is not of "much weight per se, and has often been disregarded in cases of this "kind. The variance of style in the provisions for the other married "children, and for the eldest son, is no doubt much more material, and "in some cases has been held conclusive as to the presumed intention of "the testator; and even in the present case it would present great diffi- "culties, if the eldest son had stood in the settlement, in the same line "or rank with the other children, that is, as a proper or special legatee "for a definite sum of money. But though this is their condition, his "is fundamentally different. He is not a legatee in the proper sense at "all, but the general heir or successor to the father's whole estate, bur- "dened only with the special legacies to his brothers and sisters, or the "heirs of their bodies, and insured even against those encroaching on his "inheritance beyond a certain amount. It might be very natural, there- "fore, for the father to express his intention of continuing those special

DIXON and others v. DIXON and another.

9th Feb. 1841.

Statement.

" process, in respect that the question relates to the " construction and effect of a general family settlement " burdens on his general succession in favour of the issue of his other " children, while he considered no such intimation necessary, as to the " more comprehensive and final destination of that succession to his " eldest son.

" It is impossible to read the settlement, with its codicils, without " seeing that it was the testator's enixa voluntas not to die intestate with " regard to any part of this property; and when the concluding words " of the deed are attended to, along with the necessary effect of sus- " taining the claims of the pursuers, it is apprehended that, if effect is " to be given to that will and intention, those claims must be rejected. " The deed not only leaves the whole residue to the eldest son, but " expressly provides, that the portions allotted to the children shall be in " full of all legitim, executry, and all that they could ask or claim " through his (the father's) death, or that of their mother; and further " declares, that if any of them shall in any way quarrel or object to the " settlement, they shall forfeit all right under it. Now, though this " clause may appear, in words, to apply to the eldest son as well as the " other children, it is manifest that in substance and effect it can apply " to them only; since the eldest son is made successor in universum jus " of the father, and could never, therefore, be paid off or satisfied of " his legal rights by the tender of any specific sum. The meaning of " the clause, in short, is plainly to exclude and extinguish any claim on " the part of the other children or next of kin, as heirs-at-law (in mobi- " libus) of the father. But it is impossible to give it this effect as " against the eldest son, who, by the very terms of this deed, is made " heir-at-law and universal successor to the father, under the burden only " of their provisions, which are thus limited and conditioned for his sole " and exclusive benefit. But the pursuers of this action are those other " children, and the claim now insisted in by them is, that as heirs-at-law " they shall take beyond what they are limited to by the terms of the " deed, and make an intestate succession, by denying that there is any " ground for presuming that this was in any way contrary to the wish " and intention of the testator.

" From what has now been said, it will be easily seen that, in the view " the Lord Ordinary takes of the matter, the cases in which the conditio " si sine liberis merely prevents a partial intestacy (where the deceased " has settled his whole property by deed), and excludes only the heirs- " at-law, to whom nothing is there provided in that character, are far " more favourable cases for its application, than where its effect is to " disappoint and exclude nominatim substitutes, who are preferred to " such heirs-at-law, and expressly pointed out in the deed as next in the " testator's favour to the parents of the children who are, notwithstanding, " allowed to exclude them; and the grounds of this opinion are thought " to be too obvious to need explanation. It was not without some sur-

" by a father upon his children, by which it is manifest " that he intended his whole succession to be regulated,

" prize, therefore, that the Lord Ordinary found the pursuers main- " taining, at the debate, that the case which here occurs was the least " favourable for the application of the condition in question; and that " it was even inadmissible, except where introduced to disappoint an " express substitution.

" The argument seemed to be very much rested on the circumstance " of the principle of extending a provision for a parent to his children, " though not mentioned, being generally described as a condition; which " it was said implied that there must be some ulterior destination to be " affected by such condition; and that this was not the case where, on " the failure of the legatee named, the provision merely fell back into " the general estate of the testator. In all this, however, it seems to " the Lord Ordinary that the true reason and principle of the law is " overlooked for a mere verbal subtilty. It is impossible to reflect for " a moment on that principle, without seeing that the only question in " all such cases is, whether there is sufficient ground for holding that the " testator truly wished and intended that a provision made to an indi- " vidual should, on his predecease, go to his surviving children, though " not named in the bequest, rather than to that person (whoever he might " be) to whom it must have gone, if there had been no such children? " There must always be some one, to whom, in that case, it would have " gone; and whether that person was a nominatim substitute, or the " next of kin of the testator, is plainly a matter of indifference; except " as affording more or less ground for concluding as to the testator's " probable intention; and in that view it seems impossible to doubt that " the interest of a nominatim substitute, who is named to the prejudice " of the next of kin, must have been more tenderly regarded by the " testator than his next of kin, who is excluded. If the children, there- " fore, are allowed to cut out the nominatim substitute, it would be " strange if they should fail as against the next of kin. Whether they " are properly described as succeeding in either case, by virtue of an " implied condition on the succession of those who must take, if they do " not, or whether this is less of the nature of a condition, where the " persons so taking claim only on the hæreditas jacens of the testator, are " matters which do not seem at all to touch the plain principle upon " which they do succeed, and resolve rather into criticism on the lan- " guage used in law books in relation to this rule of law, than argu- " ments as to the grounds of its application. If the heirs-at-law had " been actually called, by a form of words importing a substitution, is it " possible to suppose that this would have given the children of the " predeceasing eldest son a better right to exclude them, than if they " had been passed by altogether, and never once named (in that cha- " racter) in the settlement? and yet this is the argument of the pursuers. " If the testator had said, 'and failing my said eldest son, I direct the

DIXON and others v. DIXON and another.

9th Feb. 1841.

Statement.

" and to leave no part of his property to the distribution " of the law: And farther, in respect that by the said " settlement the eldest son is evidently the persona " prædilecta, and that his share is not, like that of the " other children, a definite sum or portion, in full satis- " faction of all legal claims, but the whole residue of " the estate, after paying the proportions of the other " children, and even guaranteed, at the expense of those " portions, to the extent of a minimum greatly exceed- " ing the maximum of what is thus provided to each of " the other children: Finds that the provision so made " in favour of Jacob Dixon the younger, the testator's " said eldest son, did not lapse, or fall to the heirs ab " intestato of the father, by the said eldest son having " predeceased his said father by a few hours; but that " the principle of the implied condition, si sine liberis " decesserit, carries the whole right and benefit of the " said provision to the defenders in this action, the " surviving children of the said Jacob Dixon the " younger, as conditional institutes in the same, and

---

" 'provision hereby made for him to be divided equally among my next " 'of kin,' the pursuers admit that they would have been excluded by his " surviving children. But they contend that the children have no claim " in this case, because the next of kin are not called at all in the settle- " ment; and that their taking any thing in that character is, indeed, " anxiously precluded. To the Lord Ordinary it seems impossible to " give any weight to such an argument, of which he can find no trace " in any former case on this subject. On the contrary, it appears that " effect was given to the principle, as against heirs-at-law, in one branch " at least of the case of Wallace, 28th January 1807 (Morr. App., voce " Clause, No. 6.), and in the very recent case of Wilkie against Jackson, " which was decided last week by the First Division, adhering to an " interlocutor of Lord Corehouse of 30th June 1835. That last case, " indeed, presented both the grounds of difficulty on which the pursuers " rely in the present, the children who prevailed having been in existence " at the date of the settlement, and the provisions to the other children, " in the same deed, being taken expressly to their heirs, while those to " their mother were only given to her individually."

" therefore sustains the defences, assoilzies the said de-
" fenders from the whole conclusions of the action, and
" decerns: Finds them entitled to expenses, allows an
" account thereof to be given in, and remits the same,
" when lodged, to the auditor, for his taxation and
" report."

DIXON and others v. DIXON and another.

9th Feb. 1840.

Statement.

The pursuers reclaimed.

At the hearing of the reclaiming note, the counsel for the respondents was understood to abandon the ground taken by the Lord Ordinary, in so far as the case was treated as falling under the rule or condition si sine liberis decesserit; and the Court also thought that the defence stood much better on the presumption of pietas paterna, by which the grandchildren — their parent predeceasing — are admitted to such parent's share; and that the circumstances here were insufficient to overcome that presumption. The Court accordingly pronounced the following interlocutor:

" The Lords adhere to the interlocutor of the Lord
" Ordinary submitted to review, in so far as it finds
" that the provision made in favour of Jacob Dixon
" the younger, the testator's eldest son, did not lapse, or
" fall to the heirs ab intestato of the father, by the said
" eldest son predeceasing his father, and assoilzie the
" defenders from the whole conclusions of the action,
" and find them entitled to expenses, and find additional
" expenses due."

Judgment of Court, 10th June 1836.

The pursuers appealed.

Appellants. — If the instrument is to be construed according to the expressed intention of the testator, it would follow that the residue of his estate, forming

Appellants Argument.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Appellants Argument.

part of the general settlement, has, by supervening circumstances, fallen to the other children as the nearest of kin. The testator having in the case of his eldest married daughter and his two younger sons provided for their representatives in the event of the parent predeceasing, it must necessarily follow, in regard to the eldest son and the two unmarried daughters, that effect must be given to the terms of the trust settlement, the general rule of law being that a legacy to a party nominatim, without mention of heirs or successors, will lapse by the predecease of the party.

Again, if implied intention or presumption is to be looked to, it will be found that no such presumption has been recognized in our law; but if it has, that the circumstances here are sufficient to rebut such presumption.

The conditio si sine liberis decesserit, borrowed from the Roman law, applies where a testator makes a bequest to his son, with an ulterior substitution to a third party in case of the death of the legatee; but the condition on which such substitution is meant to take effect flies off in the event of the legatee leaving children,[1] the principle being that if the testator had thought he would have grandchildren, it is not likely that he would have disappointed their succession by substituting a stranger, to his son the legatee: "Intelligentem non esse verisimile, "patrem, si de nepotibus cogitaverit, talem fecisse sub-"stitutionem."[2] But the judges, while they rejected the

[1] Dig. lib. 35. tit. 1. l. 102; Cod. lib. 6. t. 25. l. 6; Cod. lib. 6. t. 42. § 30.

[2] Cod. lib. 6. de Inst. & Sub.; Voet. lib. 36. t. 1. § 17, 18, & 19; Mantica, de Conject. Ultim. Volun. lib. 10. tit. 8. § 9; Grassus, Recept. Sentent. lib. de Fideicom. quest. 25.

application of the principle si sine liberis to the present case,[1] adopted a principle equally foreign to our law; viz. the presumption of pietas paterna, which proceeds on the notion that a father does not intend to leave grandchildren unprovided for, in the event of the predecease of their parent. Certainly no such exception to the general rule of lapsing of legacies is noticed by our institutional writers. Erskine[2] puts the rule broadly, that bonds of provision like legacies are personal to the child, and consequently fall, if he die before the grantor. By the law of England there can be no doubt about this case; it would be held the common case of a legacy lapsed.[3] The cases founded on by the Respondents, commencing with that of the Magistrates of Montrose v. Robertson,[4] rest on a different principle. In these, the provision is not of the nature of a legacy, but is truly a debt. In such cases the debt or provision vests in the creditor before the death of the grantor or testator. It may be a gratuitous obligation, but it is not dependent upon the survivance of the donee; if the donee predecease the grantor, the heirs take by descent from him, and not as conditional institutes in their own original right. Wood v. Aitcheson, 26th June 1789[4], much relied on, is an example of this; and although the rule was, that a settlement made by a testator upon strangers was voided by the testator afterwards having children of his own, yet, if the testator became aware of the existence of his own children, and made no alteration on his settlement, the rule was held not appli-

[1] See Rep. in Fac. Coll., & D., B., & M.

[2] Ersk. 3. 9. 9.

[3] 2 Williams Executors, 873.

[4] See Respondent's argument, p. 18.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Appellants Argument.

cable.[1] The result of the cases now referred to shows, that the principle of pietas paterna, if recognised, only applied in very favourable cases.

But supposing that the presumption of pietas paterna has been admitted into our law, it is clear that it ought to be received, and in truth has been received, as liable, like other presumptions, to be rebutted or overcome by circumstances, necessarily creating the presumption of a contrary intention; and so it was held by Lord Glenlee, in his remarkable expressions in Colquhoun v. Campbell, 5th June 1829,[2] by Lord Succoth, in Baillie v. Nelson, 4th June 1822,[3] and by Lord Corehouse, in Greig v. Malcolm, 5th March 1835,[4] who says, "the presumption "may be defeated by opposite presumptions or evidence; "and there can be no stronger evidence to that effect "than a clause in the settlement by which the testator "does make a provision for the issue of predeceasing "legatees, because it incontestibly shows he had them in "view when he made the substitution." Unquestionably a position so clearly expounded loses none of its weight by other decisions of Lord Corehouse, founded on different circumstances, and wherein the truth of the maxim was not called in question. Another valuable rule of construction is, that presumed intention, like express intention, ought to be gathered from the words of the instrument, and not from conjecture, or by adopting latent rules or presumptions not known perhaps to

---

[1] Yule v. Yule, 20th Dec. 1758, Mor. 6400; 1 Bank. p. 227; Ersk. 3. 8. 46; Watt v. Jervie, 30th July 1760, Mor. 6401; Oliphant v. Oliphant, 19th June 1793, Mor. 6603; Leitch v. Leitch, affirmed 17th July 1829, 3 W. & S. 366.

[2] 7 S. & D. 709.

[3] Fac. Coll.

[4] 13 S., D., & B., 607

the testator. It was said the testator might by express words have excluded the Respondents, but is not the including the heirs, where he really meant such to take, a stronger and more convincing mode of expressing an intention to dispose?

But it is said the circumstance of the knowledge of the son's children here is entitled to little weight; although another material circumstance, the variance in the provisions to some of the other children, is confessedly of more importance. It is not a judicial mode of construction to look at each of these circumstances per se; both circumstances, admitted to be of more or less weight, ought plainly to be looked at in combination, as matter of evidence, and along with the other facts in the case, such as the circumstance of the eldest son being already adequately provided for,—and the unlikelihood that the testator, while he might wish his eldest son to get the residue if he survived and carried on the business, should mean, at the expense of his own younger children, to enrich the family of a son capable of providing for such family.

None of the cases cited adversely come up to the present. Roughheads v. Rannie, 14th February 1794,[1] is subject, among others, to this observation, that in so far as related to the presumed intention of the testator, William Craig, it is to be remarked, that his daughter Jean, and indeed his other daughters, had no children during the testator's life. It might, therefore, very well be presumed, in conformity with the Roman principle, that the testator had not adverted to the contingency of their having children, and that

[1] Mor. 6403.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Appellants Argument.

if he had adverted to it, he would have expressly preferred those children to their deceasing mother's share of the provision. Nelson v. Baillie[1] was a case of express intention improperly worded. It is very evident that, in that case, the testator had intended to call, not only his two daughters, but their heirs, or at least the heirs of their bodies, or their children. This appears from the use of the word "foresaids" in the subsequent clause. This relative plainly implied an antecedent which had, per incuriam, been omitted. The omission was thus supplied in the judgment of Lord Hermand[2]: "The word foresaids in the deed, "clearly means the heirs of the daughters; and the "term children appears to have been omitted per "incuriam." In Wilkie v. Jackson[3] it did not appear from the record how long the testator had survived the death of his daughter, Margaret Jackson or Wilkie. It was not stated or averred that he ever knew of the existence of her children. Far less was it alleged that, at the date of the settlement, any of her children were in existence. The Lord Ordinary, therefore, is mistaken in supposing that this specialty formed any difficulty in the case. Nor is his Lordship's observation quite correct as to the other specialty. There was not so much a contrast between the terms of the provisions left to the other children and the provisions left to Margaret Jackson, as a distinction, apparently unaccountable, between the terms in which one of the provisions to Margaret Jackson was left, and the terms of the other three in her

---

[1] 1 S. & B. 458. [2] Shaw's Rep., 2d ed. p. 427, notes.
[3] 14 D., B., & M., 1141; not rep. in Fac. Coll.

favour. The provision last in order was left to her, her heirs and assignees, whilst, in regard to the three former, heirs and assignees were not mentioned. This distinction could hardly be referred to a difference of intention in the mind of the testator, as to the quality of the several provisions left to one and the same daughter. It was rather to be concluded that the testator had intended the whole to go to heirs and assignees, although he had not thought it necessary, or, perhaps, per incuriam had omitted, to repeat the destination separately, as to each of the provisions. This supposition was very much confirmed by the general clause which was subjoined to all the provisions: "And which provisions above written, in favour of "my younger sons and daughters, and theirs above "named, &c., are hereby declared to be real burdens "affecting the foresaid lands, teinds, and others." Here it will be observed that the words "and theirs "above named" (which plainly means their heirs and assignees above named,) were referred indiscriminately to all the provisions both of the sons and the daughters. But really the point was not decided. The defender originally pleaded two defences. 1st. He maintained that the provisions in favour of Margaret Jackson had lapsed by her predecease, and thus never had been due at all. 2d. He maintained that, from a variety of documentary evidence, as well as from the lapse of time, it must be presumed that these provisions had actually been paid or satisfied. These two defences were not very consistent with each other; and it soon become evident that the defender must make his election between them, and by abandoning one of them, strengthen his defence upon the other. His course, it is believed,

DIXON and others v. DIXON and another.

9th Feb. 1841.

Appellants Argument.

was a good deal influenced by the terms of the Lord Ordinary's interlocutor in the Outer House.[1] When the cause came before the Inner House, upon reclaiming notes at the instance of both parties, the defender gave up the first defence; and thus the point of law as to the supposed lapsing of the provisions was never pressed to a decision in the Inner House.

Respondents Argument.

Respondents. — By a rule of the law of Scotland, borrowed from an analogous rule of the Roman law, it has been fixed that a legacy or provision granted by a father or grandfather to his child or grandchild implies a conditional institution in favour of the issue of such child or grandchild; and accordingly, where a substitution in favour of others has been made, such substitution is construed and held to have been granted under the implied condition, si sine liberis decesserit; that is to say, the law will imply that the substitution was made upon the condition that the child or grandchild should die without leaving issue;

---

[1] "30th June 1835.—The Lord Ordinary having heard counsel for "the parties, and afterwards considered the closed record, productions, "and whole process, Finds, in respect of the implied condition si sine "liberis, that the provisions to Margaret Jackson did not lapse by her "predeceasing her father; but finds that it must be held, from the pre-"sumption and written evidence in process, that those provisions have "been already paid or satisfied; and therefore assoilzies the defender "from the conclusions of the action, and decerns: Finds no expenses "due."

See further a passage in Burge, Com. For. & Col. Law, vol. ii. p. 109: "But the grounds on which this condition is implied fail, if the son "or grand son has a child living at the time of the institution, and "no mention is made of him; or, if he has two sons, and adds the con-"dition si sine liberis in making a substitution in respect of the one, but "omits it in making a substitution in respect of the other." And he refers in a note to Voet. lib. 36. tit. 1. n. 18; Gomez Var. Resol. 5. n. 36; Cod. lib. 6. tit. 25. l. 6.

and in the event of his leaving issue, such issue will take the legacy or provision as conditional institutes, and thus evacuate or render void the substitution in favour of the third party.

It is a most reasonable and natural presumption that the testator should intend that the issue of his son or grandson should, in the event of his own predecease, succeed to the fortune destined to him, and, consequently, that any substitution to a third party should be held to be made under the implied condition of the son or grandson dying without issue. This rule, so equitable in itself, and which at first seems to have been applied solely to provisions or legacies proceeding from parents or ascendants, has in some late cases, which the respondents have referred to below, been extended to provisions or legacies proceeding from collateral relations. The rule itself has been established in the law of Scotland from time immemorial, and there is no rule of construction which is either better understood in practice or more equitable in itself.

It is true that testators very frequently express what the law would imply, and give their legacies or provisions to the heirs of their legatees. In the present case the testator, in granting the legacies or provisions in favour of his other children, substituted the heirs of their bodies in express terms; but though he had not done so, the well-established rule of the law of Scotland in regard to the construction of such instruments would, in the event of any of the children having predeceased the testator, leaving issue, have carried the legacy or provision to such issue; and even if there had been a substitution in favour of some

DIXON and others v. DIXON and another.

9th Feb. 1841.

Respondents Argument.

third party, in the event of the predecease of the child, this substitution would be held to have been granted under the implied condition si sine liberis decesserit, and would have been evacuated and rendered void if the child had left issue. All this is matter of very familiar doctrine in the law of Scotland, and can be illustrated by decisions both of an early and of a recent date.[1]

Whatever may be the rule in England, or in any other country, it is firmly fixed in the law of Scotland, that where a provision is given by a father or other ascendant, or even by a collateral relation, in favour of a child, it will not lapse or fall by the predecease of this child, but will devolve upon his issue. And even where there has been an express substitution to a third party, in the event of his predecease, this substitution will be held to be subject to the condition that he shall die without issue, so that his issue will take in preference to the substitute.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case, when your Lordships heard the argument, I entertained some doubt as to the interlocutor which is the subject matter

[1] Magistrates of Montrose v. Robertson, 21st Nov. 1738, rep. by Kilk. and Home, Mor. 6398; Walker v. Walker, 7th Dec. 1744, Elch. vo. Impl. Will, No. 5; Wood v. Aitchison, 26th June 1789, Mor. 13048; Binning v. Binning, 21st Jan. 1767, Mor. 13047; Baillie v. Neilson, 4th June 1822, Fac. Coll.; Cuthbertson v. Thomson, 1st March 1781, Mor. 4279; Wallace v. Wallace, 28th Jan. 1807, Fac. Coll.; Christie v. Paterson, 5th July 1822, Fac. Coll.; Booth v. Booth, 8th Feb. 1831, 9 S. & D. 409, & 6 W. & S. 175; Colquhoun v. Campbell, 5th June 1829, 7 S. & D. 709; Wilkie v. Jackson, 11th Feb. 1836, 14 D., B., & M., 1141.

of appeal. Upon looking, however, into the cases that were referred to, and the principle on which those cases depend, I am perfectly satisfied that the interlocutor is right.

The rule that where there is a gift to a child, and a gift over, upon the death of that child the gift over does not take effect if the child has issue, is established beyond all question, and is not matter of dispute. There seems below to have been some contest as to whether that principle applied to the case where the gift was of the surplus, and there was no gift over. Now, it appears to me, as it was stated by the Lord Ordinary below, that that is a much stronger case in favour of the principle. Where there is a gift over, the gift over does not take effect, because of the presumption of law that the intention of the settlor was that the issue of the child should take; and it would therefore be very strange if, when there was a mere gift and no gift over, the same presumption did not arise, and the issue of the child stand in the place of the parent. So far therefore as that general principle regulates this case, very little difficulty or doubt has been raised at your Lordships bar.

But it is said that in this case there are two peculiarities, which make it an exception to that rule. The one is, that the father, the settlor, was aware of the existence of the issue of the child; the other is, that in the same instrument, provision is made for the issue of some of his other children. Now with regard to the first, I do not find that that ever has been considered, per se, as constituting an exception to the rule. No doubt it is a circumstance by which,

DIXON and others v. DIXON and another.

9th Feb. 1841.

Ld. Chancellor's Speech.

aided by other circumstances, the presumption of law may be rebutted, but per se it does not constitute an exception to the rule, and it would be very strange if it were so decided. In the first place it would be strange that the father of the child should not know the state of his own family: that may happen from the birth of a posthumous child, or from other circumstances which rarely can occur; but as soon as the principle is established, viz. that there is a presumption of law in favour of the issue of a child, it naturally follows that the necessity of introducing the words is to a certain degree taken away; and it would be very strange indeed, when the law under these circumstances gives the provision to the issue of the child, if the father were presumed not to have intended that which the principle of the law presumes for him. That circumstance however, per se, has never, as far as I can find in the authorities which were referred to, been considered as constituting an exception to the rule.

Then, the other exception undoubtedly is entitled to a little more consideration; which is, that in providing for his married daughter, he provides for the children of that married daughter. The Lord Ordinary makes observations upon that part of the case which are entitled to weight and consideration. He takes notice of the different position in which the daughter and the eldest son—the interests of whose children are now in question—were placed. With regard to the daughter, there is a certain sum of money given to her, and provision is made for her, and her children after her in the event of her death; with regard to the son, he makes him general heir of his real and personal estate,—a

difference of disposition which may well explain why the testator has varied the terms of the provision for the one and the other.

But independently of that, I have not found any cases in which a variation in the provision for children has, per se, been considered to rebut the presumption of law; but, on the contrary, there are several cases in which it has existed, and in which, at the same time, the presumption has been considered as arising, coupled with other circumstances, it is true; and other circumstances there are in this case. Now the two cases to which I more particularly refer are the case of Roughhead v. Rannie, in Morison 6493, and the other case which is particularly referred to by the Lord Ordinary.[1] In both those cases there were express provisions for the issue of children, and yet the Court considered that the presumption of law was raised.

Ld. Chancellor's Speech.

My Lords, finding therefore that the principle is established, that it is clearly not in dispute but acknowledged to be part of the law of Scotland, and this case not falling within the exceptions to that rule, I have come to the clear conclusion that the interlocutor appealed from is correct; and under the circumstances, the interlocutor having been pronounced with the unanimous opinion of the Judges of the Court below, I would propose to your Lordships that it should be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, that the judgment below is right, and ought to be affirmed; and I shall state to

Ld. Brougham's Speech.

[1] Wilkie v. Jackson, ante, p. 18.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Ld. Brougham's Speech.

your Lordships the grounds upon which I have, with him, arrived at this conclusion.

It is unnecessary to examine the origin of the rule, that the condition of failure of issue is implied where provisions are made for children, and the subject-matter of these provisions is given over, whether to other children or to strangers, and that such provisions generally do not lapse by predecease of the legatee leaving issue,—or to enquire how far the Scotch law adopted the same rule, which must be admitted to have been exceedingly consistent with the general principle, that children could only be disinherited expressly, and in a certain manner and mode. It is very possible that the Scotch law may have carried the principle somewhat further than the Roman. It appears indeed, that the late decisions have extended it beyond the doctrine in former times recognized as law; and there seems a doubt whether at the time when Mr. Erskine wrote it prevailed to its full extent. The current of these decisions seems to leave no reasonable doubt that such is the rule,—that it has been extended even to collateral, though near relations, of the settlor or testator,—and that it must prevail upon the ground of a presumed intention not expressed, unless something appears sufficient to rebut the presumption. The question here is, whether any such thing exists in the present case.

The two circumstances to which my noble and learned friend has referred, and which are relied upon, are the existence of Jacob Dixon junior's children, with the knowledge of his father, when he made his settlement, and the different manner in which the provision is made for Jacob, and for the other sons and the married daughter. It does not appear that the sons were married, but the eldest daughter was married.

It is clear that the existence of children will not take the case out of the rule; for if this had been sufficient, several of the cases could not have been decided as they have been—among others the case of Neilson v. Baillie[1], in which the eldest daughter had two children at the time of executing the trust deed. The words "and "foresaids" have been relied upon as the ground of this decision, and it certainly does appear that those words were in the deed, and were taken notice of by one of the learned judges (Lord Hermand) who decided that case. But on examining the judgment it appears that only one of the five learned judges makes any reference to these words, and even he does not ground his opinion upon them, but relies, as the others do, upon the general rule of si sine liberis, &c., which would not have been at all necessary had words of inheritance been in the limitation sufficient of themselves to prevent a lapse. Indeed the words in question "and foresaids" do not appear to affect the whole gift, which is of the general residue, real and personal, while these words are introduced in excepting a part of the estate from the operation of the gift during the life of the wife. In other instances it has been said the existence of a child for a length of time after the settlement, without any alteration being made in it, repelled the presumption; but in the leading case of the Magistrates of Montrose v. Robertson[1] this circumstance had no effect, nor does it appear that this circumstance determined the case of Yule v. Yule[2], which was only a partial settlement affecting one fourth of the father's property.

[1] Ante, p. 18.

[2] Ante, p. 12.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Ld. Brougham's Speech.

The mention of the heirs of the body in the provision for the other sons and the married daughter appears to be a stronger circumstance than the existence of Jacob's children, of course known to the settlor, otherwise it could not have any effect; but it does not appear sufficient in this case to countervail the presumption which would exclude a lapse. It is needless to inquire what would have been the effect of such a diversity, had the question arisen upon a provision to the eldest son, of the same kind with the provisions to the other sons, and differing only by the omission of words of inheritance, because this is not that case. We are here upon a gift of the entire residue of the whole estate, real and personal, as my noble and learned friend has justly observed, and as the Lord Ordinary observed, after special provisions carved out of it for the younger children; and that residuary gift further distinguished from the other gifts by a direction that it shall, at all events, and at the cost, if need be, of the other provisions, be made up to a certain sum at least, which sum, as the learned Lord Ordinary has remarked, is greater than the largest amount given to any of the other children. This is not a case in which the different frame of the other limitations can exclude the application of the rule by rebutting the presumed intention of the settlor, nor does it appear that such a difference, though certainly a very strong circumstance, can be held generally and absolutely as sufficient to exclude the application of the rule, even where the provisions to which the diversity applies are exactly of the same nature.

The argument which has been maintained, both in the cases and at the bar, that the rule rests in many of the decisions upon the force of the words "children or

"issue," can never be extended to the rule generally; but it seems very seldom, if ever, to have been the ground of decision. Indeed it cannot be the ground of any decision which turns upon the provision being to children, for the rule does not extend to legacies from strangers; it is always rested upon the pietas paterna, and proceeds upon the presumption that the parent would not disappoint the issue of his children, if those children happened to predecease himself. But the cases are numerous which leave no doubt on this point, and particularly the case of the Magistrates of Montrose v. Robertson [1], where the bond was made payable to the four sons by name. Nay, in Wood v. Aitchison, 26th June 1789[1], we find the counsel who argued against the application of the rule to the case of unborn issue admitting that the law might be different as to the descendants of those to whom the gift was made nominatim, and whom he seems to have thought clearly within the application of the rule. The Court held that in all such provisions, both the one class and the other, the issue of children predeceasing were entitled to the parent's share; nor is it immaterial to observe, that the counsel whose admission is referred to was Mr. Wight, and the judge, whose view of the subject was adopted by the Court, was lord Braxfield, two of the most eminent lawyers of their day.

The case just now referred to of the Magistrates of Montrose v. Robertson[1] is exceedingly strong upon the general principle, and appears to have been held as deciding the question for a long time past. We find it referred to in all the decisions, nor is the decision the

[1] Ante, p. 18.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Ld. Brougham's Speech.

less strong for having been given in a question between the party claiming the benefit of the provision, and the obligors in a bond granted by them to the father, which obligors had paid the money as was alleged, and were held by the Court in their own wrong. It is stronger on this account, and indeed it does not distinctly appear that the money in question was the sole provision made for the parties. It amounted to only about 10*l.* among four children, all named. My noble and learned friend having referred to the case of Roughhead[1], it is unnecessary to observe upon the other cases which have been cited in support of this judgment, excepting that of Wilkie v. Jackson[2], which is very material, even if we were to admit that there is weight in the observations made for the appellant touching its peculiarities, and that these distinguish it in some respects from the present case; for, in the first place, it affords an additional confirmation of the doctrine already stated, that the implied condition si sine liberis, &c. is not at all confined to limitations to children or issue, as nomen collectivum, of the daughters Margaret and Jane, being expressly named, and the claim being made by the grandson of Margaret as representing her eldest son against James the grandson of the settlor as representing his uncles, sons of the settlor, so that the claimant did not come in under any limitation to children or issue; and, secondly, all the provisions made to Margaret, the settlor's eldest daughter, were held to descend upon her son, and through him upon her grandson, as well those which had been made to her without mention of heirs and assigns, as those which

[1] Ante, p. 13.

[2] Ante, p. 18.

had been made to her with mention of assigns. This, therefore, meets the principal objection to the application of the rule in the present case.

Nor is it any answer to urge that the general clause making the provisions for the younger children burdens upon the land has the words "and theirs aforesaid," because, admitting this to mean their "heirs "aforesaid," it would only affect those preceding limitations in which heirs had been mentioned, were it not for the implied condition si sine liberis, &c., and would of itself only make those preceding provisions which were limited by such words burdens on the land, and not the other provisions, and yet J. Wilkie recovered for the whole, as well for those that had not the words of inheritance as for those that had. The ground of the decision is that by force of the implied condition si sine liberis the provisions to Margaret did not lapse by her predecease. And this, be it observed, is the decision of the same very learned judge (Lord Corehouse), who has been cited as holding in another case (Greig v. Malcolm[1]) that the difference of omitting the mention of heirs in one limitation and inserting it in another is, as it were, conclusive proof of a different intention, and excludes the application of the rule. The case of Greig v. Malcolm[1], when examined, does not at all bear out this inference as to the scope of Lord Corehouse's observation, but were that left in any doubt his lordship's decision in Wilkie v. Jackson would remove it.

I therefore agree entirely with my noble and learned friend that the decision of the Court below has proceeded upon right grounds; and for the reasons which

[1] Ante, p. 12.

DIXON and others v. DIXON and another.

9th Feb. 1841.

Judgment.

I have stated, and those which have been stated by my noble and learned friend, I agree with him that the decision ought to be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME — RICHARDSON and CONNELL, Solicitors.

[16*th March* 1841.]

GEORGE CAIRNS, Solicitor at law, Edinburgh, sometime Mandatory for the deceased John Rogers of Well Street in the County of Middlesex, Appellant.[1] (No. 2.)

[*Sir W. Follett — James Anderson.*]

Major ROBERT ANSTRUTHER of Thirdpart, and Messrs. ROY and WOOD, W. S., Edinburgh, for themselves and as Mandatories for the said Major Anstruther, Respondents.

[*Lord Advocate* (*Rutherfurd*).]

Mandatory — Expenses. — The mandatory of a foreign pursuer applied to be relieved from the situation of mandatory; the usual intimation was duly ordered by the Court, calling on the pursuer to sist another mandatory before further procedure; an impression at this stage of the proceedings arose, originating in a communication from the defender's agents, and adopted by the mandatory, that the pursuer was dead; the defender moved that the mandatory be found liable in the expenses of process hitherto incurred; no proceeding was taken for intimating the process to the representatives of the pursuer; the Court found the mandatory liable in those expenses: — Held, 1, that the mandatory was liable to decree for the expenses up to the date of his application to be discharged; but, 2, that the proper form of proceeding, in the supposition that the pursuer was dead, would have been to have ordered intimation of the process to the representatives of the pursuer, and in the event of their declining to go on with the action, then to have decerned against

[1] 1 D., B., & M. (New Cases); Fac. Coll., 15th Nov. 1838.

the mandatory for the expenses. — It having been stated to the House, however, by the counsel for the mandatory at the hearing of his appeal, that it was discovered that the pursuer was still alive, judgment of the Court of Session affirmed, on the ground that the proceedings calling on the pursuer to sist a new mandatory were admitted to be regular; and that the result of any remit to the Court would necessarily be the pronouncing of an order precisely the same as that complained of.

1st Division.

Lords Ordinary Corehouse and Cockburn.

Statement.

THIS cause originated in a summons, raised in 1833 in the Court of Session, in the name and at the instance of John Rogers of Well Street in the county of Middlesex, merchant, and George Cairns, solicitor at law, Edinburgh, his mandatory, pursuers, against the respondent as defender. The summons set forth that the respondent was addebted and owing to the said John Rogers the sum of 500*l.* sterling, with interest and charges, in virtue of a bill of exchange, dated 16th August 1831, payable nine months after date, which, it was alleged, had been transmitted to the pursuer, through the hands of several parties (whose names were attached to it as indorsers), and, among others, the respondent.

To this action the respondent pleaded certain defences. A record was thereafter made up. In the course of the years 1835 and 1836, various proceedings took place under commissions granted by the court, for the purpose of examining havers and recovering documents.

In the month of November 1836, the appellant put into process a minute, in which it was stated, "that he "had appeared in this action in virtue of the pursuer's "mandate to him, dated 9th September 1833, and "No. 5. of process, but that he did not intend to act "longer under the said mandate, and therefore craved

" leave to resign the office of mandatory, and to with-
" draw from the process; and that the Lord Ordinary
" would be pleased to authorize notice of his said
" resignation to the pursuer, the said John Rogers, in
" order that an opportunity might be afforded him of
" sisting another mandatory to carry on the process, if
" so disposed, for which purpose, that a letter be ad-
" dressed to him, through the post office, at his last
" known residence in Dalby Terrace, London, contain-
" ing a copy of the present minute and interlocutor
" thereon; and that a similar notice, also containing
" copies of the minute and interlocutor, be addressed
" to Messrs. Herd and Samson, solicitors, Little Argyle
" Street, London, who had acted for Mr. Rogers in
" London."

The cause having been enrolled, the Lord Ordinary, 25th November 1836, pronounced the following order:— " The Lord Ordinary allows this minute to be seen till " next calling." And thereafter, 23d December 1836, the Lord Ordinary appointed " intimation to be made " in terms of the foregoing minute, in order that the " pursuer may have an opportunity of authorizing a " new mandatory in this cause." The cause was again enrolled, and the Lord Ordinary, 1st March 1837, anew appointed " the pursuer to give in a mandate in " favour of a mandatory who is ready to sist himself in " this cause, and that within eight days from this date." Soon after this the appellant was led to believe, from information received from the respondents agents, that the pursuer, Rogers, was dead. The Lord Ordinary was then moved by the respondents to find the appellant liable in expenses; which motion was opposed on the ground that, the principal pursuer being dead, no inter-

CAIRNS v. ANSTRUTHER and others.

16th Mar. 1841.

Statement.

locutor could be pronounced in the cause until another party was sisted in his place. The Lord Ordinary reported the cause verbally to the court, who allowed the case to stand over until 23d December 1837, when the Lord Ordinary, again proceeding upon the instructions of the Lords of the First Division, pronounced the following interlocutor:—"The Lord Ordinary, having "consulted with the Lords of the First Division "of the Court, appoints the parties to prepare and "lodge mutual minutes of debate upon the point re- "ported by the Lord Ordinary by the box-day in the "ensuing recess, to be seen, revised, and relodged by "the third sederunt-day in January next."

Thereafter, 15th June 1838, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordi- "nary having considered the revised minutes of debate, "appoints the same to be printed and boxed for the con- "sideration of the First Division of the Court, and that "within eight days, and grants warrant for enrolling in "the Inner House rolls." The cause was accordingly reported to the First Division of the Court, who pronounced the following interlocutor:—"15th November "1838. The Lords, having advised the mutual minutes "of debate, find the said George Cairns, as mandatory for the pursuer the deceased John Rogers, liable for "the expenses of process incurred by the defender "prior to 23d day of November 1836, when he, by "minute lodged in process, withdrew from the process "as mandatory, reserving to him any remedy or relief "competent against the estate of the said John Rogers "or his representatives; find the said George Cairns "liable in the expenses of this discussion; ordain both "accounts of expenses to be produced, and remit the

Judgment of Court, 15th Nov. 1838.

16th Mar. 1841.

" same to the auditor of court to tax the same, and " report."

The two accounts of expenses having been lodged and audited, the following interlocutor was pronounced:—" 4th December 1838. The Lords approve " of the auditor's report upon the account of expenses, " as first before mentioned, and decern and ordain the " said George Cairns to make payment to Messrs. Roy " and Wood, writers to the signet, the agents and " disbursers, of the sum of 135*l.* 18*s.* 1*d.* sterling, as " the amount of expenses found due; approve of the " report of the auditor upon the account of expenses " second before mentioned, and decern and ordain the " said George Cairns to make payment to Messrs. Roy " and Wood, writers to the signet, the agents and " disbursers, of the sum of 60*l.* 18*s.* 7*d.* sterling, as the " amount of expenses also found due, with the dues of " extract."

Judgment of Court, 4th Dec. 1838.

Mr. Cairns appealed.

The argument at the hearing was of an alternative kind, in consequence of the appellant's counsel then stating that it was now ascertained that the pursuer Rogers was still alive; the interlocutors having been pronounced under the erroneous belief that he was dead.

Appellant's Argument.

Appellant.—The mandate having fallen, and the action having become abated by the death of Rogers the pursuer and mandant, whose representative has neither been sisted nor otherwise made a party, there

CAIRNS v. ANSTRUTHER and others.

16th Mar. 1841.

Appellant's Argument.

was no existing process in which any interlocutors, either on the merits of the cause or on the accessory question of costs, could be competently or lawfully pronounced.

It was therefore premature and illegal to give decree for expenses of process, without determining the merits of the cause, or otherwise disposing of the conclusions of the summons.

And even, although the action had not become abated, the interlocutors under appeal were erroneous and unjust, in respect the condition of the appellant's obligation as mandatory was, that he should be answerable for costs only in the event of their being awarded against his constituent; whereas no such award has yet been pronounced, and the appellant did not, either ex mandato or otherwise, contract any obligation to guarantee or insure the respondent against the contingency of the pursuer's death, or to be responsible in any other event, except that of a judgment for costs against the pursuer.

If the action were to be held as subsisting to the effect of entitling the respondent to ask a decree for costs against the appellant, it follows that it must also be subsisting to the effect of entitling the appellant to show, by trying the cause on its merits or otherwise, that no decree for costs ought to be pronounced against him.

Even on the respondent's own showing, his claim against the appellant is not such as can be competently made effectual by any step in the original process, but requires a separate suit, in which the respondent must instruct his cause of action habili modo, while the appellant, on the other hand, will have the usual privilege of showing cause why decree should not be pronounced against him.

Lord Gillies rested his opinion almost exclusively on the case of Gordon v. Gordon[1], between which and the present his lordship observed that he could draw no distinction. But there was at least this obvious and important distinction, that in the one case the mandant was alive and the instance complete, while in the other he was dead and the suit was abated. In that case the ground of decision was, that in respect of the principal party's failure to sist a mandatory, judgment went against him, and for costs both against him and the mandatory down to the period of the mandatory's withdrawal. In that case, in short, the condition of the mandatory's obligation was purified, because there was a decree for expenses against his principal.

There was this further peculiarity in that case, that the mandatory, who had withdrawn from the process, wished to return to it again, and to show cause why decree for expenses should not be pronounced. But the Court, holding that the proper parties with whom the question of costs fell to be tried were the pursuer and defender in the action, and that after the mandatory had withdrawn he could not re-appear, did not recognize him as a party at all, even to the extent of listening to him on the merits. They, on the contrary, took the party whom they had, being the mandatory's constituent, and they decided against him, and thereby subjected the mandatory, Mr. Gibson Craig, in the costs up to the period of his withdrawal as mandatory.

As to the case of Reoch[2], it is sufficient to observe that in that case the mandant was not only alive, but

[1] Gordon and Gibson Craig v. Gordon, 11th Dec. 1823, 2 S. & D. 572.
[2] Reoch v. Robb, 14th May 1831, 9 S. & D. 588.

CAIRNS v. ANSTRUTHER and others.

16th Mar. 1841.

Appellant's Argument.

the mandatory was assoilzied; so that in so far as that case is a precedent, it makes directly in favour of the appellant's argument; and with respect to the terms of the mandate to the appellant, it is humbly thought to be a sufficient answer that the action was not raised by the appellant as the pursuer's commissioner or assignee, but proceeded expressly in the name of the pursuer himself as dominus litis, and of the appellant merely as his mandatory.

But the pursuer being still alive, the interlocutors have proceeded upon an hypothesis totally at variance with the true state of the case.

The House directed inquiry how far the statement now made was admitted, but the agent for the respondent not having instructed counsel, the hearing was postponed till counsel should be instructed. Upon the 11th March the hearing was resumed; the appellant repeating his former statement, and stating that the respondents had, almost a year ago, been apprized by him of this new state of the facts.

Respondents Argument.

Respondents.—The supposition that the pursuer was dead had created any little difficulty there was about the case. But the appellant having joined issue, and taken judgment on that state of matters, was not now entitled to ask an alteration of the judgment or a remit, in consequence of an alleged fact that ought to have been made known to the Court before that judgment was pronounced. The respondents were not bound to intimate the process to the representatives of the pursuer, indeed there was no form by which they could do so.

The appellant did not, and could not, by his own act, without the consent of the respondent and the express judgment of the Court, withdraw as a party from the process, to the effect of being released from all claims at the respondents instance; and, in particular, from liability for the expenses incurred during the time the appellant acted as the mandatory of the pursuer Rogers; for the mandatory of a pursuer residing beyond the jurisdiction of the Court is the party directly liable to the defender for the expenses of process incurred during his appearance; and for these expenses, when justly due, decree may be pronounced against the mandatory as a party to the process, even although from the situation of the process no decree can be pronounced against his constituent or his representatives.

The Court in all the cases which have come before them, bearing any analogy to the present, have found the mandatory liable. In the case of Gordon and Gibson Craig v. Gordon, the mandatory withdrew. The pursuer, Gordon, was called upon to sist a new mandatory, but no person would undertake the liability of expenses on his account. In these circumstances the defender obtained decree against the mandatory who had previously withdrawn. Now, in that case there was no decree on the merits, but a judgment equivalent to decree by default or in absence, in consequence of Gordon not having a persona or instance in his own individual name capable of sustaining an action. In substance, the decree for expenses was not effectual against the principal, who was not in Scotland, and had no effects or property liable to the jurisdiction of the Court; and although the principal appeared by counsel, and was anxious to carry on the litigation, he was, by fiction, no

CAIRNS v. ANSTRUTHER and others.

16th Mar. 1841.

Respondents Argument.

longer a party to the action, as decree was pronounced solely in consequence of his not being represented by a party entitled to insist before a court of law. In the case of Reoch or Maclachlan against Robb, 14th May 1831[1], a foreigner had been cited in an action of transference, as the representative of a deceased defender, and she appeared and pleaded, through the intervention of a mandatory, that she was not liable to the jurisdiction of the Scotch courts. It was ultimately found that she was not liable to the jurisdiction of these courts, and she was assoilzied from the action; but a claim was preferred by the opposing party against the mandatory for the expenses, in consequence of his improper conduct of the cause. The mandatory pleaded that as his principal was not liable to the decreet of the Scotch courts, he could not be found liable in any expenses, because (as is maintained in this case) "the mandatory "had no positive, but merely a relative existence." The Court, however, held the mandatory amenable to the jurisdiction of the Court in the matter of expenses, although his principal was not amenable; but in the circumstances of the case they held that the mandatory had not so misconducted the action as to render himself liable in expenses.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case appeared at your Lordships bar under peculiar circumstances. The course of the proceeding below was to fix a mandatory with the expenses of an action in which he had

[1] 9 S. & D. 588.

joined with the pursuer up to the time of his applying to the Court for liberty to be discharged. Now, that it was competent to him to make that application, cannot be disputed; and it is equally clear, indeed that was not disputed at the bar, and if it had been, the case of Gordon and Gibson Craig v. Gordon[1] would have established, beyond all question, that although he had a right to withdraw from the situation of mandatory, he could not relieve himself from the expenses that had been incurred during the period for which he had continued the mandatory of the pursuer. And it appears from the same case of Gordon and Gibson Craig v. Gordon to be equally clear, that according to the course of proceeding in Scotland, if the principal pursuer have notice that his mandatory has applied for leave to withdraw, and to be relieved from the responsibility of the future expenses, and to have a new mandatory substituted in his place, that the defenders would be absolved from the consequences of the action; and that the former mandatory would have been liable to pay the costs up to the time of his withdrawal. The case of Gordon and Gibson Craig v. Gordon establishes that proposition to the fullest extent.

Now it appears that in this case the mandatory took that course, and made an application to be relieved from the liability to future expenses; and in the second page of the appellant's case the proceedings for that purpose are thus stated: — "And this intimation the "memorialist followed up of this date by lodging in "process a minute withdrawing from the process as "mandatory for the pursuer Rogers. In this minute

[1] Ante, p. 35.

CAIRNS v. ANSTRUTHER and others. — 16th Mar. 1841. — Ld. Chancellor's Speech.

" the memorialist prayed the Lord Ordinary to autho-
" rize notice of his resignation to be given to Mr. Ro-
" gers, so as to afford him an opportunity of sisting
" another mandatory, and for that purpose to address
" a letter, through the post office, to Mr. Rogers, at his
" last known residence in London, containing a copy
" of the minute and interlocutor. The minute was, of
" this date," that is, November 25th, " allowed to be
" seen at a calling of the cause, attended by the
" defenders counsel, and thereafter, of this date, Lord
" Corehouse, ordinary, pronounced an interlocutor
" appointing intimation to be made in terms of the
" foregoing minute, in order that the pursuer (Rogers)
" may have an opportunity of authorizing a new man-
" datory in this cause."

" Then, under the date of 1st March 1837, the
" Lord Ordinary appointed Mr. Rogers to give in a
" mandate in favour of a mandatory ready to sist him-
" self; but no mandatory having been sisted, the
" defender enrolled the cause and asked a decree of
" absolvitur, and also a decree for expenses of process
" against the memorialist Mr. Cairns as mandatory."

In that state of the cause it appears that a proceeding took place on the part of the defender, and before the matter was ultimately disposed of; it appears that an impression prevailed, which seems to have originated in a communication from the defender, it is true, but adopted without inquiry by the pursuer, the mandatory, that Rogers was dead. Now, the Court had proceeded regularly for the relief of the mandatory from future costs, but he had subjected himself undoubtedly to the expenses already incurred; a new mandatory being to be named by Rogers the pursuer. In that

case the matter came before the Court with a statement that seemed to be admitted and acquiesced in on both sides, that instead of Rogers being in a situation to appoint a new mandatory, he was dead. Now, if he had been dead, the course of proceeding, I apprehend, would have been to call upon his representatives to have gone on with the cause; and upon their declining to go on with the cause which Rogers had instituted in his lifetime the consequences would have been the same, namely, that the mandatory would have been liable to the costs incurred up to that period; but it does not appear that any thing was done calling upon the representatives to adopt that course. Whether there was or was not does not very distinctly appear; there is nothing in the papers showing that any thing was done pursuing that course. It is obvious that some proceeding of that sort ought to have been adopted upon the supposition of Rogers being dead, for this reason, that it was quite possible, perhaps probable, if any representatives had been called upon to prosecute the cause, and had entered appearance, that it might ultimately have been discovered that there were no costs to be paid by the mandatory at all. The result of the suit, whether carried on by the original pursuer or by his representatives, might have established such a case against the defender as would have made the defender liable for the expenses, or at all events have prevented the pursuer from being liable for any part of the expenses, or have prevented the mandatory from being liable to pay any part of the expenses. Notice to the representatives of the pursuer to go on with the cause might, I say, have ultimately produced that effect, if they had appeared and had gone on with the suit, but

CAIRNS v. ANSTRUTHER and others.

16th Mar. 1841.

Ld. Chancellor's Speech.

there is in substance no evidence of any notice having been given to the representatives.

If the case had stopped there, it would have been for your Lordships to consider whether the better and safer course would not have been to have remitted it to the Court of Session, for the purpose of seeing that that course was pursued which it appears necessary should be pursued in order to meet the exigency of the case which I have spoken of as likely and possible to exist. But at your Lordships bar the case has taken a completely different turn; for now the appellant who complains of the procedure tells your lordships that the pursuer is not dead,—that Rogers is in fact still alive; although in the Court below the interlocutor appealed from proceeded on the assumption that he was dead. It is stated as a matter of some suspicion, and was so stated at your Lordships bar when the case was first heard some six weeks ago, and that was repeated when an opportunity for investigating the fact had occurred on the last day when the case was in hearing; but your Lordships have to rely on the statement of the appellant that there has been that misapprehension as to the fact of the proceeding below. Whether that misapprehension arose originally from any statement on the part of the defender, or from want of due inquiry on the part of the mandatory, is not very material for the present purpose. I am calling your Lordships attention to it for the purpose of stating to your Lordships what appears to me to be the right course to be pursued under these circumstances. If the cause was remitted to the Court of Session for the purpose of going through the process, that must necessarily end, if Mr. Rogers is still alive, in the same order which has

been pronounced; whatever difference there may be in point of form, it must be in substance the same.

It appears, from what I have stated from the appellant's case, that all the proceeding calling on Rogers to substitute a new mandatory had been gone through, and that he had not done so. The case was in that state in which it was competent for the Court to make the mandatory, the pursuer, pay the costs at the time he applied to be discharged; therefore the obvious result, the necessary result, of this proceeding in the Court of Session would be to obtain an order in substance, if not precisely, the same. That being the case, in point of fact, it appears to me that it would be an idle course of proceeding, and putting the parties to unnecessary expense, that your Lordships should remit the cause to the Court of Session, and then oblige them to obtain the same order, and by an expensive and circuitous proceeding. Under these circumstances, it being, I understand, admitted by the appellant that the pursuer Rogers is alive, and therefore it being admitted that those proceedings were regular in which he was called upon to substitute a new mandatory, and it being admitted that he had not done so, it appears to me, from the case of Gordon v. Gordon[1], that the necessary result of that state of proceedings would be to absolve the defender, and to make the mandatory pay the expenses up to the time when he applied to be discharged, which is in substance the order of which the appellant complains. I conceive your Lordships will be of opinion that you are not bound to put the parties to the expense of being exposed to additional delay and costs for the purpose of arriving at

[1] Ante, p. 39.

CAIRNS v. ANSTRUTHER and others. — 16th Mar. 1841. — Ld. Chancellor's Speech.

the same end. Under these circumstances, therefore, and on the ground that Rogers is now alive, though the Court below proceeded upon a misapprehension as to the fact, as the reasons for their procedure are in substance proved to be correct, the result must be precisely the same, I think that your Lordships' safest course would be to affirm the interlocutor originally appealed from.

If, however, it be suggested that there is any doubt as to the fact which has been stated at your Lordships bar, that might induce your Lordships to take a different course; but assuming that the appellant is right in stating that Rogers is alive, I think your Lordships, upon the ground of that admission, will be doing that which is best for all parties by affirming the interlocutor.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP — COWBURN and GAY, Solicitors.

[*29th March* 1841.]

Dame ANNE CAMPBELL BAIRD PRESTON of Valleyfield and Ferntower, Relict of the late General Sir David Baird, Baronet, K.C.B., Appellant.[1] (No. 3.)

[*Pemberton — Sir W. Follett — John Stuart — Deas.*]

ROBERT Viscount MELVILLE, JOHN JAMES HOPE JOHNSTONE, Esquire, of Annandale, and ADAM HAY, Esquire, Banker in Edinburgh, Trustees appointed for executing the Settlements of the deceased Sir Robert Preston of Valleyfield, Baronet, Respondents.

[*Knight Bruce — G. Graham Bell.*]

Entail — Trust — Investiture by Trustees — Power of Court to appoint Trustees. — A party executed a general disposition of his whole heritage to trustees; the deed contained no procuratory or precept, but it surrogated the trustees in the room of the grantor, and bound his heirs to make up titles and convey to the trustees: the same party also executed an entail of part of his lands in which he was infeft in fee simple, containing procuratory and precept; the entail was so conceived as to be a mere burden on the trust right, and was declared to be in abeyance during the trust, except to certain special effects, one of which was the entering of vassals; on the party's death the first heir of entail was regularly infeft as heir of entail, before the trustees made up any title:—Held, in an action of adjudication and implement at the instance of the trustees, and upon the objection of the aforesaid heir of entail, (affirming the judgment of the Court of

[1] 16 D., B., & M., 457.

Session,) (1.) that the trustees were entitled to make up a feudal title to the whole lands, including those contained in the entail, and to a decree of declarator that they were so entitled, and, if necessary, to adjudge in implement of the trust disposition, and ordaining the heir-at-law of the trustor to make up titles and convey the whole lands to the trustees, in order that the full right of the same might be vested in them, according to the true meaning of the trust disposition, but without prejudice to the rights or interest of any party in the said lands: And, (2.) observed, per Lord Chancellor, "That "independently of there being a sufficient legal answer "to the objection, the said heir of entail could not be "permitted thus to frustrate the intentions of the trustor, "and defeat the estate which he intended his trustees to "hold for the benefit of the trust."

Question?—The trustees named by the trustor refused to accept; on the application and with the express consent of parties interested in the succession, the Court appointed trustees, with the whole powers and privileges of those named by the trustor; one of the parties so consenting afterwards objected that the Court had no power to make such appointent:—Held unnecessary to be decided, as the appointment stood in full force, having been with the consent of the party objecting.

1st Division.

Lord Ordinary Fullerton.

Statement.

SIR Robert Preston of Valleyfield and Culross, baronet, by trust disposition and settlement, dated 17th October 1832, narrated that he had "resolved to vest "his estate, real and personal, whether situated in Eng-"land, Scotland, or elsewhere, in trustees, for the uses "underwritten;" he conveyed to "Sir Coutts Trotter, "baronet, Edward Marjoribanks, esquire, and Sir Ed-"mund Antrobus, baronet, all of the Strand, London, "bankers, and to the survivors or survivor of them, "and their assigns, and the assigns of the survivor, in

" trust, for the uses, ends, and purposes herein-after " declared, and with and under the conditions, reser- " vations, and exceptions underwritten, all and sundry " lands, heritages, teinds, fishings, tenements, or build- " ings, and other heritable or real estate, of whatever " description, and all property and estate whatsoever, " or of whatever denomination, now belonging or that " may belong to me at the time of my death, wherever " situated, in Scotland, England, or elsewhere, and also " all debts or sums of money due or belonging to me " at my death, heritable or moveable, real or personal, " wheresoever and in whatever way secured, by heritable " bonds or mortgages, or by personal bonds invested " in the public funds or banks, bills or other documents, " as also all personal estates and effects, of whatever " nature, quality, or denomination, with the whole writs " and title deeds of the said heritable subjects, and the " vouchers and instructions of the said debts; surro- " gating, and by these presents substituting, the said " trustees, and the survivors of them, in my full right " and place of the premises, with power to them to do " every thing that I could have done before granting " hereof, and binding and obliging me and my heirs to " make up complete titles to the said lands, heritages, " and heritable debts above disponed, if necessary, and " to convey the same in all form to the persons above " mentioned, and their foresaids, for the purpose herein- " after mentioned; and I name and appoint the said " Sir Coutts Trotter, Edward Marjoribanks, and Sir " Edmund Antrobus, and the survivors and survivor of " them, to be sole and only executors or executor of " this my will, and intromitters and intromitter with " my estate and effects falling under executry, hereby

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

" empowering them to expede confirmations and letters " of administration in due and competent form, se- " cluding from the said office all others my nearest " in kin."

The conveyance was declared to be under the conditions and for the "ends, uses, trusts, and purposes " herein underwritten; that is to say, providing and " declaring, as it is hereby provided and declared, that " these presents are granted by me upon trust: in the " first place, that my trustees shall hold the lands and " estates of Spencerfield, &c., and all other lands and " heritages which shall belong to me in fee simple " at my death, with the exception of the Abbey and " estate of Culross," and certain other lands specified, " subject to the entail or entails thereof, to be executed " by me subsequent to the date hereof, in favour of " myself and the heirs whatsoever of my body; whom " failing, in favour of Dame Anne Preston Campbell " or Baird, my niece, eldest daughter of my brother " Patrick Preston, &c., and the heirs of her body; " whom failing, Catherine Preston, my niece, youngest " daughter of the said Patrick Preston, and the heirs " of her body; whom failing, Dame Anne Preston or " Hay, my niece, daughter of my brother Colonel " George Preston, and wife of Sir John Hay of Smith- " field and Haystoun, baronet, and the heirs of her " body; whom failing, Charles Dashwood Bruce," &c. whom failing, other heirs substitute; " whom all fail- " ing, my own nearest heirs whatever or assignees, " and subject to all the provisions, declarations, reserva- " tions, limitations, burdens, clauses prohibitory, irritant, " and resolutive, powers, and faculties, to be contained " in such deed or deeds of entail, which deed or deeds

" of entail shall be held and taken to be a part hereof; " and I not only reserve power and liberty to execute " such deed or deeds of entail, any thing herein con- " tained to the contrary notwithstanding, but I direct " and appoint my trustees, in the event of my failing, " to grant and execute such deed or deeds of entail of " my fee simple lands and heritages, excepting as " aforesaid, or that such entails shall be liable to any " exception or nullity on any ground whatever, to settle " and entail the said land and heritages to and upon " the persons or heirs of entail herein-before mentioned, " and under all the requisite provisions, declarations, " reservations, limitations, burdens, clauses prohibitory, " irritant, and resolutive, powers and faculties of the " strictest entail. In the second place, that my trustees " shall hold the said abbey and estate of Culross," and the other lands excepted from the first branch of the trust purposes, " subject to the other entail or entails " thereof to be executed by me subsequent to the date " hereof, in favour of myself and the heirs whatsoever " of my body, whom failing, in favour of the said Dame " Anne Preston Campbell or Baird, for her life; whom " failing, in favour of the said Catherine Preston, for " her life; whom failing, in favour of the said Dame " Anne Preston or Hay, for her life; whom failing, in " favour of the said Charles D. Bruce, and the heirs male " of his body; whom failing, to other substitute heirs;" whom failing, to the trustor's heirs whatsoever, subject to all the provisions, &c. " to be contained in such other " deed or deeds of entail, which deed or deeds of entail " shall be taken to be a part hereof."

The deed then reserved power to the trustor to execute such entails; and if he failed to do so, or if the

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

entail was liable to exception, it enjoined the trustees to execute a strict entail on the heirs last above mentioned, in the same terms as those which have been quoted as to the Spencerfield entail.

The trust deed then proceeded: "All which deed or "deeds of entail, to be executed by me or by my said "trustees, I appoint my said trustees, as soon after my "death as may be, to obtain to be recorded in the "register of entails, and to make up and complete all "necessary feudal titles to the lands and heritages in- "cluded therein, so that the said entails may be ren- "dered effectual in law, and for the expense of which "proceedings they shall have credit in accounting for "my trust means and estate; but declaring, that any "entails of the said lands and others, whether executed "by myself or my trustees, or titles completed thereto "in the persons of any of my said heirs, shall not "interfere with or come in competition with the ends "and purposes declared in the present trust, of and "concerning my said fee simple lands and heritages, "during the survivance of my said three nieces first "called to the succession thereof, but said entails shall, "during the lives of my said three nieces, and survivors "and survivor of them, continue suspended and in "abeyance, so far as regards the rents and produce of "my said lands and estates, which shall be received "and applied by my trustees in the manner after "declared."

The third trust purpose was then declared to be, that the trustees should sell the heritage generally conveyed to them, and "convert into money the whole of my "said personal estate, wherever situated, as shall be "necessary and proper and to their discretion shall

" seem meet, excepting in so far as the said general " direction and appointment to sell and dispose of the " whole of my said real and personal estate is limited " and restricted by the preceding instructions to my " said trustees to entail, and also by what is herein- " after specially contained."

The trustees were directed, fourthly, after paying debts and legacies, to " invest from time to time the " remaining price or proceeds to arise by sale of my " real and personal estate as aforesaid in the public " funds, or in real security, in England or Scotland, as " they may think best."

5thly and 6thly.—The trustees were directed to pay legacies and annuities to a large amount.

7thly.—They were directed to remove certain furniture from Valleyfield House to Culross Abbey, and to place there such plate as the trustor should insert in an inventory, failing which, such plate as the trustees, " according to their discretion," should set apart for the use of the Abbey, and cause to be removed thither. As to the furniture and effects already in the Abbey, it was directed that it should be possessed by the heirs in the entail of the Abbey, under all the provisions and conditions of the entail; and the trustor appointed his " trustees executors to see the said destination and, " entail of said furniture and effects duly enforced." The trustees were to allow the use of the furniture at Valleyfield, on certain conditions, to each of the trustor's three nieces successively, for her life, beginning with Lady Baird Preston; and after the death of the last surviving niece, they were to sell that furniture, and hold the proceeds as part of the trust estate.

8thly.—The trustees were directed " to hold the said

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

" Abbey and estate of Culross, and other lands belonging to me within the parish of Culross, and to be contained in the foresaid entail or entails, as a residence and possession common to my said three nieces and to the said Sir John Hay, during their several lives, hereby conferring on all of them jointly the right to live at and manage the said Abbey and estate according to their pleasure, but without prejudice to feudal titles being completed thereto under the said entail or entails, in the persons of my said nieces or other heirs of entail in succession, as formerly directed." The trustor also, in order to render the Abbey a comfortable residence, directed his trustees to hold a sum of 10,000*l.*, " at the pleasure of my said three nieces and the said Sir John Hay, and the survivor of them, to be laid out in improvements on the said Abbey," &c.

9thly.—The trustees were directed " to pay and apply the free yearly produce of the rest, residue, and remainder of my means and estate, heritable and moveable, including the yearly rents and produce of all the lands and heritage to be entailed as aforesaid (excepting the said Abbey and lands within the parish of Culross), in manner following; that is to say, my said trustees shall once every year, upon any day to be fixed by themselves, make up and state an account of the whole yearly rents, dividends, interest, and profits of my lands (excepting as aforesaid), stocks, property, and effects, heritable and moveable, and after deducting therefrom the whole annual outgoings of every description, including the payments of annuities and others contained in my settlements already made or to be made, shall divide the balance into three equal parts, and shall pay over the same

" annually, as soon after the date of making up said " accounts as may be, as follows; viz. one third thereof " to my said niece Lady Baird, one third thereof to my " said niece Catherine Preston, and the remaining third " thereof to my said niece Lady Hay and the said Sir " John Hay, and the survivor of them, and that during " the joint lives of the said Lady Baird, Catherine " Preston, and of the said Sir John Hay or Lady Hay; " it being my will and intention to confer on the said " Sir John Hay, during his survivance of the said " Dame Anne Hay his wife, the same right and interest " in my succession, heritable and moveable, as I have " conferred on his wife."

The deed then provided that on the death of any of the trustor's nieces her share should accrue to the survivors or survivor; providing always, that if Sir John Hay survived Lady Hay he should receive the interest which would have been received by her if alive.

The deed then proceeded, " and in order that effect " may be given to this direction and appointment, I " hereby appoint and declare that the entail or entails " to be granted by me or my trustees as aforesaid in " favour of my said nieces, seriatim, shall stand sus- " pended during their lives, except only that my said " nieces in succession shall be allowed to exercise all " rights of patronage which may belong to the said " estates, and also to enter the vassals and feuars; for " which purpose it shall be competent to my trustees, " immediately after my death, to apply for the recording " of all deeds of entail executed by me, and to com- " plete, at the expense of the trust estate, proper " feudal titles under the same to the lands and estates

PRESTON v. V. MELVILLE and others. — 29th Mar. 1841. — Statement.

" belonging to me in the persons of my said three " nieces, according to their order of succession; but " declaring, that notwithstanding the completion of " such feudal titles in the persons of my neices in " succession, the whole rents and produce and casual- " ties of superiority shall be receivable by my trustees " for the purpose above expressed."

10thly.—The trustees were directed, immediately after the death of the last survivor of the trustor's nieces and Sir John Hay, to invest the residue of the trustor's estate, real and personal, in the purchase of lands in Scotland, and to entail these on the heirs of entail of Spencerfield, &c., to record such entails, and to complete feudal titles to the entailed lands in the person of the heir of entail; and, " on such steps being taken as are " necessary to render the said entails valid in law, and " the prior purposes of the present trust being duly " accomplished, the heir entitled to succeed shall be " thereupon let into possession of the rents and pro- " duce of my whole lands and estate, as well as of " those which may be entailed by myself, as of those " which shall be settled and entailed by my said trus- " tees, and this trust shall then be considered as at " an end."

The trust deed gave power to the " trustees or " trustee acting for the time to assume, and by a writing " under their or his hands or hand to nominate and " appoint any other person or persons to be a trustee " or trustees along with them for the purposes afore- " said; and such trustee or trustees so assumed, &c. " shall have the same powers and privileges, and be " subject to the same condition with the aforesaid " original trustees." The deed then declared the trus-

tees, "whether original or assumed," to be not liable for factors, &c., if habit and repute responsible when appointed; nor for "neglects or omissions of any kind "in the execution of the trust, nor for the insolvency "of debtors or others with whom they may transact, "nor shall they be liable singuli in solidum, but "each only for his own personal acts, deeds, and "receipts." The deed revoked all former wills, and reserved full power of alteration, but dispensed with delivery.

Sir Robert Preston, by an entail of the lands of Spencerfield, &c., dated 3d November 1832, granted and disponed, "as I do hereby, agreeably to and in "terms of my trust disposition and deed of settle-"ment, dated the 17th day of October in the present "year 1832, and with and under the conditions, pro-"visions, &c. after specified, give, grant, and dispone "to and in favour of myself and the heirs of my body, "whom failing," to Lady Baird Preston, and the other heirs substitute mentioned in the first trust purpose of the trust disposition above quoted. Sir Robert bound himself and his heirs to infeft the institute and heirs of entail, but under the conditions, provisions, &c. "herein-"after inserted." It was declared that "the whole "heirs and substitutes aforesaid shall be obliged to "possess, hold, and enjoy the same upon this present "deed of entail and the titles to be made up pursuant "thereto, and by or upon no other title whatsoever." It was also provided, "that the several heirs of tailzie "and substitutes above specified, upon the succession "opening to them, severally and respectively shall be "obliged to procure and obtain themselves entered "infeft and seised in the said lands, estates, and others

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

"without delay, at any rate within two years after they "have an opportunity so to do." It was declared, "that these presents shall stand good, and continue "effectual and obligatory, not only as to the lands and "others foresaid, whereto a sufficient title shall be "made up and completed in my person before my "decease, but also to compel my heirs-at-law and other "heirs to complete and make up titles in their persons "to any part of the said lands and others to which I "shall not have completed and established my own "titles, and then to resign the same into the hands "of the respective superiors thereof, in favour of "the heirs of tailzie herein-before specified, with and "under the whole conditions, provisions, restrictions, "limitations, exceptions, clauses irritant and resolutive, "and reservations before written." The deed also purported to be granted under reservation of the grantor's life-rent and power to alter, but dispensing with delivery. The deed also empowered the grantor's procurator or any heir of entail to cause record the entail, and expede charters, &c. in favour of the heirs of entail. The deed contained a precept for infefting the grantor and heirs of entail, under the conditions, provisions, &c. "before written."

On the same day, 3d November 1832, Sir Robert Preston executed an entail of the Abbey and estate of Culross, on the same heirs as were pointed out in the trust deed for that estate. This entail was similar to that of Spencerfield in all respects, and in particular it made the same reference in the dispositive clause to the trust deed which was made in the Spencerfield entail, and it did not make reference to the trust afterwards.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

On 15th April 1833 Sir Robert Preston executed a probative writing, setting forth his desire that the Abbey should be called after the name of his deceased wife, Abbey Elizabeth, declaring that this name should be inserted by the heirs of entail in all retours, charters, &c., under pain of forfeiture of the estate; and that this writing should be held part of the entail, and recorded along with it; and adding, "I further authorize and "require my trustees to make and enforce all other "more formal deeds or clauses to give authority and "effect to my declared intentions of perpetuating the "said name and designation."

Sir Robert, by another probative writing, dated 17th April 1833, narrating that Charles Dashwood Bruce, the first heir called after the death of his three nieces, was engaged in trade, and therefore exposed to the risk of reverses; that Sir Robert wished to guard against the probability of the estates ever passing under the control of creditors, and, therefore, directed the trustees "to hold and possess the whole lands and "heritages already settled and entailed by me, or which "I have appointed to be settled and entailed by my "trustees, and to draw the whole rents and produce "thereof, till such time as the said Charles Dashwood "Bruce shall establish, to the satisfaction of my said "trustees, that he is relieved from business, and from "all debts and engagements attendant on his having "been engaged in business." The trustees in the interim were only to pay to him the "rents and pro-"duce as an alimentary allowance," and it was declared "that my entails shall during the space foresaid stand "suspended in the same manner as I have appointed "during the lives of my said nieces." On the same

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

day Sir Robert signed a duplicate of the trust deed without varying it in any respect. In December 1833 he postponed Charles Dashwood Bruce in the order of succession. In other respects the trust deed and entails remained unaltered, except as to certain legacies, at the date of Sir Robert's death, which happened at Valleyfield in Scotland, on 7th May 1834. He left not only large heritable estates in Scotland, but also a great amount of personal property, situated partly in Scotland and partly in England.[1]

The whole trustees named by Sir Robert refused to accept. Lady Baird Preston, the first heir called under the two entails, then expede a service as heir of entail, and was infeft. She also took out letters of administration in England for uplifting the moveable succession there, and Sir John Hay and Miss Preston became her sureties, and she expede confirmation in Scotland as executor quà next of kin. Lady Hay, who was both heir of line and of conquest to Sir Robert Preston, made up titles to a heritable bond for 10,000*l.*, in which he had died infeft. These steps were taken with concurrence of the other parties interested in the succession. The two entails were recorded on 20th May 1834 and 14th February 1835.

In July 1834 a petition was presented to the Court of Session by Charles Dashwood Bruce and two other parties interested in the heritable or moveable estate left by Sir Robert Preston, setting forth the trust settlement and the declinature of the trustees; and subsuming that as the deceased was a domiciled Scotchman, his whole moveable estate was subject to the laws

[1] See next Case, No. 4.

of Scotland; and therefore praying the Court to appoint a trustee for the purpose of executing the trust settlement.

In January 1835 another petition was presented by Sir John and Lady Hay, praying the Court to appoint Viscount Melville, John James Hope Johnstone of Annandale, and Adam Hay, banker in Edinburgh, and the survivors or survivor, to be trustees for executing the trust disposition and settlement in the room of the trustees named in the deed; and also praying the Court to ordain Lady Baird Preston and Lady Hay, being respectively executrix quà nearest in kin and heir-at-law of Sir Robert, to execute such conveyances of the trust property vested in them in favour of the trustees so to be named as would vest the whole estate, real and personal, in the trustees, and enable them to carry the trust into full execution.

Answers were lodged to these petitions for Lady Baird Preston and Miss Preston. An arrangement was afterwards made, in terms of which a joint minute was lodged for Sir John and Lady Hay, Lady Baird Preston and Miss Preston, and Charles Dashwood Bruce and one of his copetitioners, the other being now out of the field. The minute set forth that the petition of Sir John and Lady Hay had been presented, praying the Court, "with consent of all parties interested, to appoint "the said Viscount Melville, John James Hope John-"stone, and Adam Hay, and the survivors and survivor "of them, to be trustees for executing the different "powers and provisions contained in the trust disposi-"tion and settlement therein mentioned executed by "the deceased Sir Robert Preston, and that in the room "of Sir Coutts Trotter, baronet, Edward Marjoribanks,

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

"esquire, and Sir Edmund Antrobus, baronet, trus-
"tees nominated by the said Sir Robert Preston, who
"declined to accept of the said trust," or otherwise to
"appoint a judicial factor;" which petition was followed by answers for Lady Baird Preston and Miss Preston, but further consideration was, of this date, superseded of consent. The minute further bore, "That the "the whole parties are now agreed to concur in the "prayer of the said petition for the nomination of the "parties above named to be trustees for executing the "trust created by the said Sir Robert Preston, and "therefore now moved your Lordships to grant the "prayer of the said petition to that extent."

To this minute there was subjoined an express consent "to what is above craved," which was signed by the counsel for Lady Baird Preston and Miss Preston. A similar consent by the other parties was also subjoined.

The Court then pronounced an interlocutor, which, after narrating the petitions, answers, and minute, proceeded: "And further, of consent and as craved in "the said minute, nominate and appoint the said "Viscount Melville, John James Hope Johnstone, and "Adam Hay, and the survivors and survivor of them, "to be trustees for executing the different powers and "carrying into effect the provisions contained in the "trust disposition and deed of settlement and will "dated 17th day of April 1833, executed by the de-"ceased Sir Robert Preston of Valleyfield, baronet, "and codicils thereto referred to in said petition, "and that in room and place of the trustees named by "the said Sir Robert Preston, who have declined to "accept, and with all the powers and faculties conferred

" upon the said original trustees by the said trust deed, " and decern; and grant warrant for extracting an act " and decreet accordingly in usual form, upon caution " being found, before extract."

Caution was found for trustees so named, and, in particular, Lady Baird Preston became one of the cautioners for the said John James Hope Johnstone. This bond of caution proceeded upon the narrative that " I the said John James Hope Johnstone, having " consented to accept of the said nomination of trustee, " in terms of and under the provisions and upon the " footing expressed in the said deed of settlement of " the said Sir Robert Preston, baronet, deceased, and " under the conditions as if I had been one of the " trustees nominated by the said settlement allenarly, " and that it is proper that I should find caution for my " due discharge of the duty of trustee as aforesaid, to " act in the same manner and in all respects as if I had " been one of the trustees originally nominated in the " foresaid trust deed and settlement, and no otherways; " therefore I the said John James Hope Johnstone as " principal, and Dame Anne Campbell Baird Preston " of Ferntower, Lochland, and Valleyfield, and Miss " Catherine Preston, sister of the said Dame Anne " Campbell Baird Preston, as cautioners, sureties, and " full debtors for and with me, do hereby enact, bind, " and oblige ourselves, conjunctly and severally, our " heirs, executors, and successors whomsoever, that I " the said John James Hope Johnstone shall duly, law- " fully, and truly execute the office of trustee, &c., and " with all the powers and penalties, and with the whole " privileges and immunities conferred upon the said " originally named trustees."

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

Under the above arrangement Lady Hay conveyed to the trustees the heritable bond for 10,000*l.* to which she had made up titles.

The trustees desired to obtain themselves fully vested in the whole heritage of Sir Robert, including the two entailed estates, and also in the whole moveable estate, considering that this was the most effectual method of executing the trust, and that the effect of the two entails stood suspended until the execution of the trust. The trustees therefore raised a summons of declarator and constitution against Lady Hay, setting forth the several deeds executed by Sir Robert, and the proceedings under which they had been appointed trustees; that they had right to complete titles to the whole heritable estate, so as to enable them to carry into full effect the purposes of the trust; that no special conveyance of any of the heritage existed in the trust dispositions; and they had therefore raised letters of general charge against Lady Hay as heiress of line and of conquest of Sir Robert, and charged her to enter heir; and that they had required Lady Hay to convey to them the heritable estate.

The summons concluded for decree, declaring "that "the whole rights, powers, faculties, privileges, and "immunities vested in and bestowed by the before "recited trust dispositions, deed of settlement, and will, "in and upon the persons therein named as trustees, "are now vested in and bestowed upon the pursuers as "trustees nominated and appointed by our said Lords "in room and place of the said Sir Coutts Trotter, "Edward Marjoribanks, and Sir Edmund Antrobus; "and that the pursuers have in consequence full power "and right to make up and complete regular and valid

" titles in due form of law to the whole of the lands " and other heritable estate disponed by the said Sir " Robert Preston by the deed before recited, and to " obtain themselves duly vested and seized therein, so as " they may be enabled to carry into full and proper " effect the various trusts and purposes declared of and " concerning the said lands and others, and may main- " tain their rights and titles as trust disponees aforesaid, " independently of acts, consent, interference, or con- " currence of all or any of the parties interested in the " subjects of the said trust deed, on a full and complete " feudal title in the lands disponed in trust as aforesaid; " and, if necessary, to adjudge in implement of the " said trust disposition, deed of settlement, and will:" further, that Lady Hay should be ordained to make up a title to the whole heritage left by Sir Robert, including the Spencerfield and Culross estates, and to obtain " the full, heritable, and irredeemable right " thereof established in her person," and to convey the said lands and heritage " to the pursuers, and to the " survivors or survivor of them, as trustees aforesaid, " and to their successors in office, for the uses, ends, " and purposes specified in the foresaid trust disposi- " tion, in order that the full and complete right of the " same may be properly vested in the persons of the " pursuers and trustees foresaid, and their foresaids, " according to the true intent and meaning of the said " trust disposition, deed of settlement, and will, and " without prejudice to any right or interest which " may belong to the said defenders or others in the said " lands and estate, or the administration thereof, after " being so vested in the pursuers as trustees foresaid."

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

Lady Baird Preston and Miss Preston were called as defenders for their respective interests.

Lady Baird Preston pleaded in defence, 1st, that even if the original trustees could pursue such an action, the appointment of the Court did not place the pursuers in their situation; 2d, any such proceeding, if competent, ought to have been by summary petition to the Court; 3d, as the defender duly completed her titles by infeftment under the entail, and the fee is full in her person, there remained nothing in hereditate jacente of Sir Robert to be taken by his heir-at-law, and carried from that heir by adjudication in implement; 4th, the trustor did not contemplate a double set of titles in the trustees and in the heirs of entail, but that the title of the latter should form the sole feudal investiture of the estates.

The Lord Ordinary, after closing the record, ordered cases with which avizandum was made to the Court, when their Lordships pronounced the following interlocutor:—"8th February 1838. The Lords having "considered the revised cases, record, and whole cause, "and heard counsel for the parties, repel the defenders "and decern in terms of the libel; find the defender, "Lady Baird Preston, liable to the pursuers in the "expenses of process."

Judgment of Court, 8th Feb. 1838.

Lady Baird Preston appealed.

Appellant's Argument.

Appellant.—The Court of Session, by the act and decreet of their appointment, did not confer on the respondents any right to make up titles to the entailed estates vested in the appellant, nor did it place the

respondents in the same situation in this respect with the original trustees named by Sir Robert Preston.

It was ultra vires of the Court of Session to appoint the respondents to be trustees, or at least to be testamentary trustees, of Sir Robert Preston, and to confer on them the whole rights, powers, faculties, privileges, and immunities of the original trustees. The appointment of the respondents is therefore invalid, and they have therefore no title to pursue the action of declarator and constitution brought by them against the appellant; and in the circumstances of this case, the appellant cannot be held legally barred, either by her consent to the respondents appointment, or otherwise, from pleading this objection against the respondents title to pursue the said action.

Had the appellant been the sole party beneficially interested in the trust estates, her consent, given under misapprehension as to the competency and consequences of the proposed nomination, never could confer on the Court any greater or broader judicial functions than the laws of the land had bestowed upon them, and never could bar the appellant from retracting that consent or stopping short in the dangerous path into which she had been led, the moment she discovered that she had gone wrong. But the appellant is not the only party beneficially interested in the trust estates. She represents, and is bound to maintain the rights and defend the interests of the whole substitute heirs of entail. The appellant is, in fact, expressly bound by the deeds of entail, under the pain of forfeiture, not to allow the lands to be adjudged, either in implement, as proposed by the respondents, or in any other manner, nor to

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

allow any other infeftment than that passed upon the entail to be expede, and least of all to allow a fee simple title (as the respondents conclude for) to be completed in the person of the trustor's heir at law. From these obligations no such personal exception as that attempted to be taken against the appellant can relieve her, and while she is thus called upon to maintain the interests of parties who are deeply interested in the respondents nomination as trustees, and who are in no shape bound to recognise it, she does not see how she can be barred from objecting to that nomination, which ought either to be binding upon all concerned or binding upon none.

Even if the respondents could be held to have been validly appointed trustees by the Court of Session, they must still be regarded as judicial trustees, in so far at least as to render the only competent method in which they can apply for power to make up titles to be by summary petition to the Court of Session, to explain the present powers of the respondents, or to confer on them new powers, and not in the form of an ordinary action.

But even if the respondents could be viewed as in all respects in the same situation with the original trustees, they would not be entitled to make up feudal titles in their persons to the entailed estates, both because it does not appear from Sir Robert Preston's deeds that it was his intention, in the event which has happened, of his executing the entails which he contemplated in his own lifetime, that titles should be so completed in the persons of the trustees; and also because, upon feudal principles, it is incompetent, seeing

that the fee is full in the appellant's person, for the respondents to complete titles to the entailed estates through the medium of Lady Hay, the heiress-at-law.

Sir Robert Preston executed deeds of entail, which must be admitted to be in all respects full and perfect dispositions of the lands, containing procuratory of resignation and precept of sasine, and all other usual clauses by which he conveyed the lands to himself and the heirs of his body, whom failing, to the appellant, and a certain series of substitutes. Sir Robert died the institute under these entails, and the appellant has been served and retoured as heiress of tailzie and provision to him, and now stands validly infeft in the estates. The appellant's infeftment, so far from being unduly or surreptitiously obtained, has been expede in compliance with the express injunctions of Sir Robert, both in the trust deed and entails, under the latter of which it would have inferred a forfeiture not to have so completed it. The fee is thus full in the appellant's person, and the question is, can Sir Robert Preston's heiress-at-law, notwithstanding, complete fee simple titles to the entailed estates, as she is called upon by the conclusions of the respondents summons now to do? The leading conclusion of the summons bears that Lady Hay, the heiress-at-law of Sir Robert Preston, should be ordained to procure herself "served and retoured as heiress of "line and of conquest to the said deceased Sir Robert "Preston, under the proper character or characters "required by the investitures or writs of and connected "with the lands and other heritable estate after de-"scribed, which pertained to the said Sir Robert "Preston at the time of his death, or by other legal "method to obtain the full heritable and irredeemable

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

"right thereof established in her person." Then follows a description of the entailed estates, being those in which the appellant stands infeft, and it is added, "in "which whole lands and others above mentioned, the "said deceased Sir Robert Preston died last vest and "seised as of fee, and the said Dame Anne Preston, "otherwise Hay, defender, may purchase and procure "herself duly and lawfully served and retoured and "entered as heir aforesaid." Now, how can Lady Hay expede a service as heiress of line and of conquest to Sir Robert Preston in these lands? The brieve of service must[1] bear that the inquest are to inquire whether Sir Robert died last vest and seised as of fee in the lands? "In whose hands the fee is now and has been "since the death of the ancestor? And whether Lady "Hay be the heiress entitled to succeed to him in the "lands?" The heads of this brieve could not be answered in the affirmative in favour of Lady Hay. Sir Robert Preston did not die last vest and seised in fee simple in the lands. He died the institute under the entails, as is evident from the circumstance that the appellant did not and could not make up a title as the institute, but was served and retoured as the substitute heiress of tailzie and provision to Sir Robert Preston. The brieve sent to the inquest on the occasion of the appellant's service necessarily directed them to inquire whether Sir Robert died vested as the institute under the entails, which the inquest found that he did, and the inquest on Lady Hay's service cannot therefore consistently find that he died vested in fee simple. Again, under the brieve to be issued for serving Lady Hay, must

[1] Ersk. 3, 8. 67.

not the inquest necessarily find that the fee is now in the hands of the appellant, and has been so since Sir Robert's death? And how, therefore, can it be found that Lady Hay is entitled to succeed to Sir Robert as his heiress of line and of conquest in these very lands? If, however, these things be as the appellant has now stated them, it cannot be disputed that no charge to Lady Hay to enter herself heiress of line and of conquest to Sir Robert Preston can be of any avail, or be made the foundation of an adjudication in implement, because no party can be effectually charged to do that which it is incompetent to do; nor can an adjudication in implement be led unless the heir be in a situation to make up a title and grant a conveyance for which such an adjudication in implement is only a substitute. If, indeed, the respondents or Lady Hay can take the appellant's service and infeftment out of the way by a reduction, that may be a different matter; but, in the mean time, so long as the appellant's title stands unchallenged, there is, it is submitted, no room for a service and infeftment in favour of any other party, especially in favour of Lady Hay, who is herself a substitute heiress of entail, and bound under the pain of irritancy to complete no fee simple title to the lands.

It is incompetent, on feudal principles, for the respondents to get infeftment, as the deeds and title stand, at least in the way they contend for.

While Sir Robert stood the fiar of estates he might have granted warrant to infeft the trustees, and also the heirs of tailzie[1], by declaring and creating the trust infeftment a real burden on the tailzie; or he might

[1] Stair, 2. 3. 53.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

have attained the same purpose by simply declaring, in the dispositive clause of the entail, that the trust was to be a real burden on the infeftment under the entail, which would have been sufficient without any trust infeftment. But in either case there must have been express clauses for the purpose, both in the trust deed and in the entails. As to the mode of constituting such burdens, the following authorities are referred to.[1]

Before, however, any warrant (i. e. procuratory or precept) was granted for infefting the trustees, Sir Robert had denuded himself, and consequently his heirs, of the fee of the estate, and all right, title, and interest he had thereto. Neither he nor his heirs (i. e. of line and conquest) were any longer in a situation to fulfil any obligation to infeft the trustees.

The general disposition to the trustees did not convey the fee; it was not properly a conveyance, but only an obligation to convey.[2] They have only by the general disposition jus ad rem, which makes them mere personal creditors.[3] Now, before this personal obligation was attempted to be made effectual, the fee was full in the person of Lady Baird Preston by her infeftment.[4]

If then the heir of entail be fiar, the fee was clearly full, and any special service or second infeftment was excluded.[5]

---

[1] 1 Bell's Com. p. 686, 688, 689; Ersk. 2. 3. 49, 50, 51; Bell's Principles, § 919, 920, 921.

[2] 1 Jurid. Styl. 265.

[3] 1 Bell's Com. p. 750.

[4] Bell's Principles, § 1720; President Campbell's Opinion, 5 W. & S., p. 189, note; Ersk. 3. 8. 23.

[5] Per Lord President Hope, quoted by Sandford, p. 338, 339; Kilkerran, quoted Ib. p. 341; Bell's Principles, § 1829, 1834, 1843, 1845, 1851.

The effect of Lady Baird Preston's sasine is very important. Dispositions never become a real right till they be completed by sasine.[1] The instrument of sasine is now "accounted a necessary solemnity for perfecting "the feudal right, and hence the maxim 'Nulla sasina, "nulla terra;' without it the grantor cannot be "divested." It is "never renewed except upon the "change of a vassal."[2]

The feudal right continues in the disponer, till infeftment is taken by the disponee.[3] "By the seisin the fee is full."[4] There can be no such action as the present, except against a party who is served in special and infeft, or is in a situation to be so. The form of proceedings is; 1st, general charge to Lady Hay, which is held to supply place of general service; 2d, decree of constitution against her, finding that she is bound to implement the obligation to convey, come under by her ancestor, by making up titles and disponing; 3d, special charge, which was held to supply the place of special service[5], and must be to the person last infeft in lands[6]; 4th, decree of adjudication in implement, which is held as a judicial disposition by Lady Hay to the trustees, and which will enable them to go to the superior and get charter and sasine.[7] The action now opposed is the second of the above steps. If successful in it, the trustees will be entitled to proceed with the remaining steps without possibility of objection.

---

[1] Stair, 2. 3. 16.
[2] Ersk. 2. 3. 34.
[3] Ersk. 2. 3. 48.
[4] Ersk. 2. 5. 46.
[5] 1 Bell's Com. p. 709, 710.
[6] 1 Bell's Com. p. 743; Illustrations, vol. 2. p. 423; Principles, § 1857 (1.); Ersk. 2. 12. 48; Brodie's Stair, notes to p. 462.
[7] 1 Bell's Com. p. 748, 749.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

It is said the appellant, as a gratuitous disponee, is bound to implement Sir Robert's obligation to grant a title to the trustees; but the appellant is no more bound by Sir Robert's incompleted intentions than any other substitute heiress of entail. Supposing, however, she were so, there are no conclusions against her to convey to the trustees for completing a title through her. She is called only to defend herself against the conclusions for a title through Lady Hay.

It would be a very different thing for Lady Baird Preston to grant a title subordinate to her own, and to allow the respondents to get (what they ask) a paramount title through Lady Hay, on which the entails are to be merely a burden. It is said the summons reserves the effect of the entails, but it merely says, without prejudice to any right or interest belonging to the defenders or others in the lands, "after being so "vested in the pursuers," i. e. in so far as consistent with the pursuers right and title, which is avowedly intended to be paramount and superior.

The title of the trustees is to come in by displacing the title of the appellant. If so, how can the old title under the entails be, as it was said it was, reserved?

It was suggested, however, that Lady Hay could serve in special, because Sir Robert created two fees, —a trust fee and an entail fee. But it has already been shown that the general disposition does not create a fee, but merely a personal obligation; it is not even made a real burden: there cannot be two co-existing fees.[1]

---

[1] Ker v. Howison, 11th Feb. 1708, Mor. 14,357; 2 Bell's Illustrat. p. 424.

The only instances attempted to be given of co-existing fees were life-rents, heritable securities, and infeftments in real warrandice. But none of these are fees: they are mere burdens on the fee; and the reference to them only serves to bring out the principle.[1]

As to an heritable security, the infeftment upon it is, in its very terms, and avowedly, a mere burden on the fee; in so much so that if the infeftment of the party who granted the securities were to be reduced or set aside, the infeftment on the heritable security would fall along with it. The same thing holds as to an infeftment in real warrandice. It is a mere burden upon the right of the party, which operates as a security to the person to whom it is granted, in case his own lands shall be evicted from him.[2] The infeftment which the respondents seek is of a totally different nature; not a burden on the appellant's infeftment, but a paramount, superior, and independent infeftment, which shall subsist, although the tailzied infeftment should be altogether set aside,—not a burden, but a fee.

Suppose this were an adjudication for a debt contracted by Sir Robert the entailer, could they adjudge through Lady Hay in place of through the appellant? Clearly not. They say a trust infeftment does not so far denude the grantor as to prevent an adjudication against his heir-at-law, and that this has been settled ever since the case of Campbell of Edderline, 14th Jan. 1801.[3] But on looking at this case, it will be seen that it was a trust to take effect in the grantor's lifetime for payment of his debts, and that the trustees might entail

---

[1] 1 Bell's Com. p. 54, 756. [2] Ersk. 2. 3. 28.
[3] M. Appendix, voce Adjudication, No. 11.

PRESTON v. MELVILLE and others. 29th Mar. 1841. Appellant's Argument.

the remainder of his lands. The trustees neither paid the debts nor executed the entails, and after his death an adjudication by one of his creditors against his heir was sustained, but solely on the principle that the reversionary right was in the trustor and his heirs. All the subsequent cases are of the same sort.[1]

It thus appears that a trust infeftment such as the respondents are now seeking under a family settlement, with no reversionary interest, would be an infeftment in the fee of the estate, unless it had been bestowed by the trustor in the form of a real burden on the tailzied fee. Even although the infeftment in favour of trustees under a family settlement would not have excluded the heiress-at-law from serving (which it would), it does not follow that infeftment on the entail would not so exclude her.

It was said that a fee may be given on condition of a man returning within a certain time from Rome, &c. This, by the law of Scotland, is impossible, unless by giving it to trustees for him, and failing him for others, which would make the trustees fiars in the meantime.

The fee must be in some body[2]; and here it is in Lady Baird; and from her only (if at all) can a title be got. "In all attempts to adjudge a tailzied estate, "the charge must be directed against the heir of tail-"zie, not the heir-at-law." (Gairns, March 1682.)[3]

All the forms and rules of procedure applicable to adjudications for debt are equally applicable to adjudications in implement, which differ only in the particulars

---

[1] See Brodie's Stair, p. 558, 559 notes; Bell's Principles, § 1715.

[2] Bell's Principles, § 779.

[3] 2 Brown's Sup. 21; Bell's Principles, § 1858; 2 Bell's Com. p. 435.

stated.[1] A party bringing an adjudication in implement is just viewed as a personal creditor; so much so, that on bankruptcy no distinction is recognized between his rights and the rights of other personal creditors[2]; and the same general or special charge, decree of constitution, &c. is required as in case of debt. Therefore if the present action would be inept with a view of adjudging for Sir Robert's, the entailer, debt, it must be equally inept for the purpose of adjudging in implement.

The case of Lord Selkirk[3] is important, as showing, first, that if the estates could be adjudged at all by the trustees, it could only be through the appellant; and, second, that it is no answer to her objection to say (as was there pleaded ineffectually), "that were "there any thing in the objection, the only effect of it "would be to cast the diligence, and put him (the "pursuer) to the expense of a new adjudication against "the defender."

In another case[4] it was held, that a party being in possession under an entail, another party could not make up a title to the same estate (which he claimed as the heir of a former investiture) by granting a disposition to be followed by adjudication in implement; although it was strongly pleaded (as it is here) that if the right of the new claimant was good, he was entitled to the remedy he sought, and that if his right was bad, it could do the party in possession no harm.

---

[1] 1 Bell's Com. p. 748. [2] Ib. p. 750.

[3] Earl of Selkirk v. Dalrymple of Stair, 3d March 1756, M. App. voce Adjudication, Nos. 1 & 5; Brown's Sup. p. 314.

[4] Dunlop (Ramsay's Trustee) v. Cochrane, 31st March 1824, 2 Shaw's Appeals, p. 115.

PRESTON v. V. MELVILLE and others.

28th Mar. 1841.

Respondents Argument.

Respondents.—It is incompetent for any party, ope exceptionis, and by way of defence, to object to the title of a party duly vested in an office or right by a decree of the Court.

No objection in any form can be received from the appellant, who was a party to and concurred in the appointment of the respondents, along with all others having interest, and at whose instance the decrees appointing them were in truth obtained.

No application to the Court for authority to raise this action was necessary. The authority to do so is the decree of nomination and appointment.

The appellant has neither title nor interest to object to the conclusions of this action. The first conclusion is, in terms of the decree, that all the rights and powers vested by the trust disposition in the persons therein named, being vested by the decree in the respondents, they have full power and right to make up titles in the ordinary form of law to all heritable property disponed by the trust deed, so that they may be enabled to administer the trust estate, and manage and defend the same upon a complete feudal title, and where that is necessary, to adjudge from another party, the heir-at-law, Lady Hay, in implement of the general conveyance in the trust deed.

Now what title or legal interest can the appellant, who is not the heir-at-law, exhibit as giving her a right to oppose this conclusion? She has concurred in the application to the Court, and in the decree nominating the respondents to be trustees in the room and with full powers of those named in the deed. She is also a party obtaining benefit under that trust deed. The decree of nomination then is her own act. She has

herself invested the respondents with the powers, and charged them with the duties of the original trustees. The decree of nomination must now be acted upon. The purposes of the trust must be executed by those charged with that duty by the appellant herself. The trust can only be executed in the ordinary process of law, and in the manner obligatory upon the original trustees. Now their duty was to make up titles to the trust property. Trustees must do so in order to vest the trust estate in themselves for preservation, protection, management, and administration. Where there is a special conveyance, they are then the disponees with a full and adequate title. Where there is a general conveyance of all lands belonging to the trustor, the mode of making up titles is by adjudging the lands not specially enumerated from the heir-at-law in implement of the general conveyance, and the heir-at-law cannot oppose this, if the general conveyance is unimpeachable.

The appellant is not the heir-at-law in any of the properties, either generally or specially conveyed. How can she be entitled to resist the conclusions for adjudging in implement from the heir-at-law the property conveyed in general terms to the trustees, but not by special description? Such adjudication in implement is necessary, whether for the purpose of executing the trust in favour of the appellant herself, or of defending that property against the appellant if she brings forward any competing title.

In either view, she cannot object to this conclusion of the summons. So far as the title is necessary for administering and executing the trust for the benefit of the parties interested, including the appellant, she is barred from objecting by being a party to the decree of

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Respondents Argument.

nomination. So far as this measure of making up titles is necessary in order to protect the estate against any competing title founded upon by the appellant herself, it is quite plain that she cannot for an instant be listened to in resisting the conclusion now adverted to. In that case she is an adverse party against whom the trust estate is to be protected and defended. She has no right to appear in order to prevent their putting themselves in the situation of defending the estate. On the contrary, her very adverse interest requires that her objection should be over-ruled. For having concurred in giving the respondents the title and power of trustees, she has neither title nor interest to object to a conclusion necessary for the performance of the duty with which she has charged the trustees.

There is no inconsistency whatever between the title in the person of the heiress of entail, and of the trustees.

The competency of completing the respondents title under the trust deed, notwithstanding the completion of the tailzied title by Lady Baird, might be illustrated in different ways. First, suppose that the appellant had not yet expede a service and infeft herself in the lands quà heiress of entail, it cannot be disputed that it would then have been quite competent for the pursuers to complete their title by adjudication in implement. The completion of such a title by the trustees would not, so far as they can discover, have prevented the appellant from subsequently serving heiress of entail and infefting herself quà heiress of entail in the entailed lands. A trust infeftment and a tailzied infeftment could in such a case have been both competently expede, and might have subsisted together. If so, it is not very obvious, either upon feudal principle or other-

wise, why the mere circumstance of the appellant having been permitted or having contrived to complete her title first should exclude or render incompetent the completion of the trustees title. This view demonstrates that the appellant did not, by her service and sasine as heiress of entail, take up the plenum jus or entire right to the lands which was bestowed by Sir Robert Preston's deed of settlement. She only took up the tailzied right. Had the trustees gained the priority of completion, they would have taken up an estate in the lands by feudal title, and which was quite capable of being feudalized in their persons. They would, however, have left another and separate estate or right in the lands, likewise capable of being feudalized in the person of the heir of entail. If there were thus created by Sir Robert's deeds two separate estates or rights in the lands, both capable of being feudalized, where, the pursuers would just ask, is the estate or right which they would have taken up in the case supposed? Or what is now to prevent them from feudalizing that right equally as if the appellant had not served heiress of entail? Her Ladyship cannot pretend that she has acquired the fiduciary right or estate; and as little can it be maintained that it became extinguished or sopited by the mere completion of the appellant's separate and subsidiary right as heiress of entail. Secondly, suppose again that Sir Robert Preston had not executed the entails during his own lifetime. According to the express declarations and instructions of the trust deed, the execution of the entails would in that case have been incumbent upon the pursuers as trustees. The trust deed not only contains a disposition to the trustees of the entailed lands, but it is thought that the trustees in

PRESTON v. V. MELVILLE and others, 29th Mar. 1841.

Respondents Argument.

the case supposed would have completed feudal titles to the whole estate before making the entail of the lands which were ordered to be entailed. Having completed their title and feudalized their general right, the trustees would then have disponed the lands to the appellant and the other heiresses of entail. This conveyance would have had the effect of separating the tailzied right from the fiduciary right, or of creating or rather explicating the two separate rights or estates in the lands intended and made by the testator. The appellant, as the institute in the entail, would and might competently have taken infeftment in the lands during the subsistence of the trust; but would the disposition of entail, or sasine thereon, have in that case had the effect of totally denuding the trustees of all right or feudal title in the lands contained in the entails? Would not the title then have stood precisely in the situation in which the pursuers now seek to place it? They would have been infeft quà trustees in the lands, while the appellant would have been also infeft in them quà heiress of entail. Both rights and both sasines would have been quite compatible; the appellant's right, however, being inferior to, and being suspended in operation during the subsistence of the trust.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—In this case the interlocutor appealed from repelled the defences, and decerned in terms of the libel. (His Lordship read the first conclusion of the summons.)

The judgment of the court giving to the pursuers what they so asked has decided that the pursuers are

entitled to the feudal title or the legal estate in the lands comprised in the testamentary dispositions executed by Sir Robert Preston, and to the assistance of the Court to complete such titles. This the appellant, who completed her title by infeftment under the deeds of entail, disputes; and contends, first, that the title claimed by the pursuers is inconsistent with that given to her, and that her's ought to prevail; and, secondly, that there was no intention expressed by Sir Robert Preston that the pursuers should have the feudal or legal title in the lands.

With respect to the first, it is, I think, sufficiently shown that there is not that inconsistency in the titles claimed by the pursuers, and possessed by the defender, which can impeach the interlocutor appealed from, if it shall appear that the titles claimed by the pursuers were intended to be given to them by Sir Robert Preston, and are necessary for the due execution of the trust disposition. The real question, therefore, is, whether such intention is to be collected from those dispositions, and whether such necessity exists?

I think it quite unnecessary to consider one point, which is the subject of much argument in the papers; namely, whether the Court of Session have the power of appointing new trustees, where the trustees named by the authors of a trust disposition fail or decline to act, because, in this case, the pursuers were, on the 19th of May 1835, appointed trustees for executing the different powers and carrying into effect the provisions contained in the trust disposition and deed of settlement and will of Sir Robert Preston, in room and place of the trustees named by him, who had

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

declined to accept, with all the powers and faculties conferred upon the said original trustees, and this with the consent of the appellant. This appointment stands in full force; and whilst it so stands, the title of the pursuers under it cannot be disputed by the appellant.

I proceed, therefore, to examine the trust disposition and will creating the entail, for the purpose of ascertaining whether they contain satisfactory proof of Sir Robert Preston's intentions, as to whether the feudal or legal title should, during the continuance of the trust, vest in the trustees or in the appellant the heiress of entail.

The trust disposition, which is dated 17th October 1832, commences by stating that the author, Sir Robert Preston, had resolved to vest all his estate in trustees, and bound himself and his heirs to make up complete titles to the lands, if necessary, and to convey the same in due form to the trustees; but he declares that the trustees shall hold such lands subject to the entail or entails thereof, the provisions and declarations of which are then specified, and under which the appellant claims, which deed or deeds of entail were to be taken as part of the deed, and reserved to himself the power of executing such deed or deeds of entail; and in the event of his failing so to do, he directed his trustees to execute such deed or deeds of entail, so as to settle the lands upon the persons therein mentioned, of which the appellant was the first named after failure of issue of the settlor, and he appointed his trustees, as soon after his death as might be, to obtain the same to be recorded in the register of entails, and to make up and complete all

necessary feudal titles to the lands included therein, so that the said entails might be rendered effectual in law; but he declared that any entails of the said lands, whether executed by him or his trustees, or titles completed thereto in the persons of any of his heirs, should not interfere with or come in competition with the ends and purposes declared in the trust during the survivance of his three nieces first called to the succession thereof (of whom the appellant is the first), but that such entails should, during the lives of his said three nieces, and the survivor or survivors of them, continue suspended and in abeyance, so far as regards the rents and produce of his said lands, which were to be received and applied by his trustees in the manner after declared; he then gives to his trustees a power of selling his estates, and, after payment of his debts, directs them to invest what shall remain of the produce of such sale and of his personal estate in the public funds or real securities; he then, after giving many annuities and legacies, directs his trustees to hold the Abbey and estate at Culross, contained in the foresaid entail, as a residence and possession common for his three nieces during their lives, conferring on all of them jointly the right to live at and manage the same, but without prejudice to feudal titles being completed thereto under the entails in the person of his nieces, or other heirs of entail in succession, as before directed.

He then, in the ninth place, directed his trustees to pay and apply the free and yearly produce of his property in three equal parts to his three nieces, with survivorship; and in order to give effect to that direction he declared that the entails to be granted by him

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

or his trustees in favour of his said nieces should stand suspended during their lives, except that his nieces in succession should exercise all rights of patronage belonging to his estates, and enter vassals and feuars, for which purpose it should be competent for his trustees immediately after his death to apply for the recording of all deeds of entail executed by him, and to complete, at the expense of the trust estate, proper feudal titles under the same to the said lands in the persons of his said three nieces, according to their order of succession; but declaring that notwithstanding the completion of such feudal titles in the persons of his said nieces, the whole rents and produce and casualties of superiority should be receivable by his trustees for the purposes expressed.

He then directed his trustees, upon the death of the survivor of his nieces, to lay out the residue of his personalty in the purchase of lands in Scotland, and to execute and grant deeds of entail thereof, according to the declaration before directed of his estates, and to cause such deeds of entail to be recorded, and to make up and complete feudal titles to the lands therein contained in the person of the heir having right thereto; and on such steps being taken as were necessary to render the said entails valid in law, and the prior purposes of the present trust being duly accomplished, the heir entitled to succeed should thereupon be let into possession, and that the trust should then be considered at an end.

He then declared, that the receipts and conveyances by his trustees should be available to all purchasing from or assigning to them, and directed his trustees

not to sell any part of his property during the lives of his nieces, but to sell it after their deaths, declaring that such parts and other lands specified were included in the present conveyance to his trustees.

By two dispositions or deeds of entail, both dated 3d November 1832, he created entails of the different parts of his estate, under which the appellant claims. Those deeds are in the usual form, but both commence by reciting that the same were made for the preservation of the estate in the line of succession thereby pointed out, and agreeably to and in terms of his trust disposition and deed of settlement. When the provisions of this trust deed are considered, there does not appear to be room for doubting that the author of it intended that his trustees, during the continuance of the trust, should have the complete dominion over the property, and all estate, power, and interest in it which could be necessary to carry his objects into effect, which indeed, if it were necessary, will be found further confirmed by the codicil of 17th April 1833, being after the date of the deeds of entail. That these trusts and these objects of the testator could not be carried into effect without the feudal or legal title to the estate seems to be equally free from doubt; but as the trust deed did not contain any precept of sasine (or covenant for infeftment) in favour of the trustees, it was found necessary for them to complete their feudal title by constitution and adjudication in implement, which was therefore the object of the suit, and is the substance of the interlocutor appealed from. But the appellant contends that she has made up her feudal titles as heiress of entail, and that such title existing is incon-

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

sistent with any feudal title to be made in favour of the trustees.

There seems to be a sufficient answer to that proposition in law, but it does not appear to me to be necessary to enter into that point, because the interlocutor deals only with the heiress of line, and not with the appellant as heiress of entail. It only directs the heiress of line to do what the testator by his trust deed undertook she should do, namely, if necessary, to make up and completé titles to the lands, and, if necessary, to convey them to the trustees. If under this trust deed the trustees are entitled to have such titles made up, how can the appellant, claiming as a gratuitous disponee (or purchaser) under the author of this deed, and under an instrument declared to be agreeable to and in terms of the trust deed, — by having made up her titles under the entail, which is directed to be suspended during the trust, — be permitted to frustrate the intentions of the donor under whom she claims, and defeat the estate which he intended his trustees should hold for the purposes of the trust?

For these reasons, I move your Lordships that the interlocutor appealed from be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certi-

fied as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such statutory process or diligence for the recovery of such costs as shall be lawful and necessary.

29th Mar. 1841.

Judgment.

SPOTTISWOODE and ROBERTSON — MEGGISON, PRINGLE, and MANISTY, Solicitors.

[*29th March* 1841.]

(No. 4.) Lady BAIRD PRESTON, Appellant.[1]

[*Pemberton — Sir W. Follett — John Stuart — Deas.*]

Viscount MELVILLE and others, Respondents.

[*Knight Bruce — G. Graham Bell.*]

Moveable Succession, Administration of — Jurisdiction. — Certain parties named trustees as well as executors of the will of a domiciled Scotchman, having declined to accept, the Court of Session, with consent of parties next of kin, appointed other trustees with all the powers given or competent to the original trustees. Previous to such appointment, one of the next of kin, a domiciled Scotchwoman, obtained letters of administration of the moveable estate in England from the Prerogative Court of Canterbury, and found caution there for the due execution of the office. She filed a bill in Chancery in England, praying to have the usual decree for taking the accounts, and administration of the personal estate, and that the residue might be secured for the benefit of the parties interested. The trustees then raised an action against this administratrix before the Court of Session in Scotland, concluding for declarator that all the property and estate which belonged to the testator at his death, wherever situated, in Scotland, England, or elsewhere, and in particular the funds and effects held by the administratrix under the foresaid letters of administration, now pertain and belong to and ought to be vested in and transferred to them as trustees aforesaid; and the Court having decerned to that effect, judgment of the Court of Session reversed, and cause remitted back with a declaration,—

[1] 16 D., B., & M., 472.

that the property of the trustor in England ought to be administered by the said administratrix by virtue of the letters of administration granted by the Prerogative Court of Canterbury.

Observed, per Lord Chancellor, "The domicile of a deceased "party regulates the right of succession to his moveable "property; but the administration must be in the country "in which possession of his property is taken and held "under lawful authority."

(*See the Statement of Facts in the preceding Report.*)

1st Division.

Lord Ordinary Fullerton.

Statement.

THE trustees and executors named by the testator Sir Robert Preston declined to act; whereupon, by consent of several of the parties chiefly interested, including Lady Baird Preston,—Lord Melville, Mr. Hope Johnstone, and Mr. Adam Hay were appointed by the Court trustees to execute the trusts of the settlement of Sir Robert Preston, in the room of the trustees and executors named by him, and with the whole powers and privileges of these trustees. They prepared to vest themselves fully with the whole heritage, and also with the whole moveable estate left by Sir Robert, and conveyed by him to his trustees. They accordingly raised the action of declarator and constitution against Lady Hay, the heir-at-law, mentioned in the preceding report.

Previously to the respondents appointment by the Court the appellant had been confirmed executrix quà next of kin in Scotland. Her Ladyship had also taken out letters of administration in England. The respondents applied to the appellant to convey to them the moveable estate in her hands; and as she had paid a considerable number of legacies, &c. the respondents offered to discharge her and her cautioners in the Eng-

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

lish and Scottish courts of her intromissions, upon obtaining delivery of the residue of the estate, and of the vouchers of her disbursements. She thereupon conveyed to them the moveable estate in Scotland, which she held as executrix quà next of kin; but she refused to convey to them the moveable estate to which she had administered in England, stating that, as she had found caution in the courts of England for the due execution of the office of administratrix, she and her cautioners, Sir John Hay and Miss Preston, could only be safe by obtaining a judicial discharge in the English courts.

The respondents, in January 1836, filed a bill against the appellant, first in Exchequer, and afterwards in Chancery, which prayed that she should be ordained to produce accounts of her intromissions as administratrix; that the Court should take an account of the estate left by Sir Robert Preston in England, and of Lady Baird Preston's intromissions; and that the residue of the estate, so far as extant, should be paid over to them for the trust purposes, on due provision being made for such debts and legacies as might still remain unpaid.

On the 1st February 1836, the appellant, as administratrix, filed a bill in Chancery against the respondents, praying that an account might be taken under the direction of the Court of the moveable estate of Sir Robert Preston, that the same might be applied in a due course of administration, under direction of the Court, that the clear residue should be ascertained and secured for behoof of the parties interested, and that she might be discharged of her office as administratrix. She afterwards added a prayer for an injunction against the trustees proceeding in Scotland to defeat her right.

On the 25th February 1836 the respondents raised an action of declarator and payment against the appellant before the Court of Session, narrating the deeds and proceedings in Scotland above detailed, and concluding for declarator that the whole property and effects of Sir Robert Preston, of every denomination and wherever situated, especially all moveable estate and effects, and "in particular the whole funds and effects of the "said deceased Sir Robert Preston, held by the said "Dame Anne Campbell Baird Preston, defender, under "the foresaid letters of administration granted and "issued in her favour by the foresaid Prerogative Court "of the Archbishop of Canterbury, now pertain and "belong, and should be vested and transferred to the "pursuers, and survivors or survivor of them, as trus-"tees nominated and appointed by our said Lords for "executing the settlements of the said deceased Sir "Robert Preston, in room and place of the said Sir "Coutts Trotter, &c., but in trust always for the uses, "ends, and purposes specified and contained in the "foresaid trust disposition, deed of settlement, and will; "and that the whole rights, powers, faculties, privileges, "and immunities, vested in and bestowed by before-"recited trust disposition, deed of settlement, and will "in and upon the persons therein named, are now "vested in and bestowed upon the pursuers as trustees "nominated and appointed by our said Lords; and in "particular, that the receipt or receipts, discharge or "discharges of the pursuers are good and effectual to "all concerned, transacting with, purchasing from, and "paying to the pursuers as trustees foresaid, so that the "receipts and discharges to be granted by the pursuers "to the said defender, on her paying and transferring

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Statement.

" the foresaid funds and effects, will be a valid and " and sufficient discharge and exoneration to her of her " whole intromissions with the same, so as to relieve her " of all claims on the part of the said trust estate, for or " anent her said intromissions with any part of the " funds so intromitted with by her, and to be transferred " as aforesaid."

Then there follows a conclusion for decree ordaining the defender (appellant) forthwith to pay and transfer the moveable estate there specified, and all other moveable estate which she held or might hold as administratrix. There was also a conclusion that she ought to be ordained to deliver over the vouchers of payments by her as administratrix, " to the end the pursuers may " be enabled to exoner and discharge her of her intro- " missions." Sir John Hay and Miss Preston, as cautioners for the defender, were called, for their interest.

Among other defences the appellant pleaded, 1st, that being subject to the jurisdiction and control of the Prerogative Court, in which she had found caution for the due performance of the office of administratrix, she was not amenable to the Scotch courts in any question as to the funds so administered by her in England; 2d, that neither the respondents nor the Scotch courts could discharge or release her from the obligations and duties of the office of administratrix.

Judgment of Court, 8th Feb. 1838.

The Lord Ordinary, after hearing parties on a closed record, ordered cases, with which avizandum was made to the Court. The Lords pronounced the following interlocutor:—" 8th February 1838. The Lords having " considered the revised cases, record, and whole cause, " and heard counsel for the parties, find and declare

" in terms of the first conclusion of the libel, and " decern, and to this extent allow an interim extract to " go out: Quoad ultra, supersede consideration of the " other conclusions of the libel, as also of the question " of expenses."

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Judgment of Court.

Lady Baird Preston appealed.

Appellant.—The question raised by the action of declarator and payment at the respondents instance against the appellant, being substantially an inquiry as to the title to administer the funds in England, such a question falls under the exclusive jurisdiction of the courts in England, these funds being now legally vested in the appellant as administratrix with the will annexed, under a title and in a character conferred by the proper ecclesiastical court in England, the validity of which title cannot be tried in the Scotch court, nor can her duties and liabilities, in her character of administratrix, be determined or released by the decree of the Court of Session.

Appellant's Argument.

The distinction between questions relative to the beneficial interests of parties in a moveable succession situated in a foreign country, and questions relative to the title to administer that succession, or as to the mode of taking it up and making the rights of parties thereto effectual, is a plain one, and fully recognised by the law of Scotland. The former class of cases is regulated by the lex domicilii testatoris. The latter class of cases is regulated by the lex rei sitæ. The present is a question solely as to the title to administer, the mode and manner in which the succession is to be realised, so that the rights of parties therein may be rendered effectual.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

It is not a question as to the beneficial rights of the parties themselves, which rights are not here challenged, and about which there is no dispute. It is, therefore, a question which must (even apart from all specialties) be regulated by the lex rei sitæ, and not by the law of the deceased's domicile.

The present action, in whatever way decided, cannot affect the rights of any of the parties interested in Sir Robert Preston's succession. These rights and interests will remain the same whoever shall possess the title to administer the estates. The question here is a pure question as to the title of administration,—whether that title stands now in the persons of the respondents, or in the person of the appellant; and how the appellant is to denude of, and be discharged of, her actings in the character of administratrix, after the primary purposes for which she obtained that office are accomplished? It is, therefore, a question which falls entirely to be regulated by the law of England, and to be disposed of by the judges of that country, under whose jurisdiction the moveables are situated, from whom the appellant obtained her office, and by whom alone she can be validly discharged. The principles for which the appellant here contends are very strongly illustrated by the case of Egerton against Forbes, 27th November 1812[1], the rubric of which is, "Moveable property in England, to "which the wife succeeded during the subsistence of the "marriage, but which was not confirmed during the "husband's life, found to have fallen under the jus "mariti." See the law as there laid down by the late Lord Meadowbank.

[1] Egerton v. Forbes, 27th Nov. 1812, Fac. Coll.

Neither can the appellant discover how the Court below got over the difficulty which so prominently presents itself, from the important specialty that the appellant has been lawfully invested with the office of administratrix of the English funds by the English courts, to which she has found caution, and to which she is amenable and bound to account for her whole intromissions and management. The receipt and discharge of the respondents could not be a sufficient discharge and exoneration to the appellant. Will the appellant's statement to the English courts, from which she holds her office, that she has accounted to and been discharged by the respondents, supersede the necessity of her accounting to and being discharged by these courts? The Court of Session has found that the English funds, and the whole vouchers thereof, belong to and are vested in the respondents; but if the appellant, in deference to the judgment of that Court, should pay over these funds, and deliver these vouchers to the respondents, will this relieve her from again making payment of these funds into or under the orders of the English courts, and from there exhibiting the very vouchers and documents which she had previously placed in the possession of the respondents, and without production of which to the competent court she could not be relieved of her office, or get the account of her intromissions audited and discharged?

Lord Gillies observed[1], that "it makes no difference "whether that personal property be situated in France "or in Turkey, for it is just as if it were in Scotland." This, with deference, might be very true, if the present were a question as to the nature or relative amount of

[1] See Rep.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Appellant's Argument.

the rights of the parties beneficially interested in the estate,—as to the proportions in which they were entitled to share the residue,—as to the vesting or lapsing of the legacies bequeathed by the testator, or any other matters of that description. But the question raised in the present case is not of that sort at all; it is not even a question between the appellant as administratrix, on the one hand, and any of the legatees, or others interested under the settlement, suing for payment of their legacies or shares of the funds, on the other. In such questions, it might fairly be contended that the appellant was liable to be sued either in Scotland or England, so long as she was personally subject to the jurisdiction of the courts of both these countries; and the nature and extent of the beneficial interests of the parties must of course be regulated by the law of the testator's domicile. But the present is a question as to parting with the whole funds, property, vouchers, and documents belonging to the estate; as to the title to manage, administer, and distribute it; as to the liberation and discharge of the appellant from her office of administratrix; and as to the conferring of the powers, privileges, and duties of that office on the respondents. In such a question, it is humbly submitted to be a very different matter, "whether the personal property be situated in "France or in Turkey," and that it is very far from being to be considered "just as if it were in Scotland."

The respondents contend that the decree has a more limited effect than the appellant asserts, and that it merely contains a finding, in Scotch law, of what is the legal right of the respondents, but ordains nothing to be done; it is plain, however, that it strikes at the appellant, in so far as that if such decree were well

founded, her actings as administratrix must cease, and the whole property now in a course of administration in the English court must be paid over to the trustees. The question of domicile so much argued has really nothing to do with the matter.

Appellant's Argument.

[*Lord Chancellor.*—Assuming that the respondents were properly appointed, the Court of Session might perhaps be entitled to declare that they should be trustees as to the residue.] There would have been no objection to that.

Respondents Argument.

Respondents.—The plea of the appellant, that as she holds a title to the English funds from the English ecclesiastical court, her right and title thereto cannot be interfered with by the Scotch court, she being alone answerable to the courts in England, is founded upon a double misconception of the nature of the defender's title, and of the object of the pursuers' present action.

Sir Robert Preston having been a domiciled Scotchman at the period of his death, his whole personal succession, wherever situated, must be regulated and distributed according to the law of Scotland.[1] As personal property has no locality, the law holds that it is all situated within the territory of the defunct's domicile, or, as it has been expressed, gathered round his person or in his pocket at the time of his death. This is precisely the import of the case of Egerton, quoted by the appellant.

---

[1] Selkrig v. David, 1 Rose's Rep. 478; Anstruther v. Chalmers, 2 Sim. 1; 2 My. & Cr. 513; Yeats v. Thomson, 1 Sh. & M'L. 795; Breadalbane v. Chandos, 2 My. & Cr. 739; Warrender, 2 Sh. & M'L. 154; Stanley v. Birnie, 3 Hagg. 373; ex parte Geddes, 1 Gl. & Jam. 432; Male v. Roberts, 3 Esp. N. P. 103.

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Respondents Argument.

According to this principle, the Scotch court is the natural and competent court for determining all questions in regard to the right to or distribution of this succession, and all or every part thereof, without distinction as to where the funds or property may be situated. Being a Scotch succession it must be regulated by Scotch law; and that law, provided there be jurisdiction over the parties requiring to be called, falls to be determined by the Scotch court. If any party has got possession of or pretends right to any part of the succession, it is quite competent for the true owners, whether under intestacy or by will, to vindicate the property or seek declarator of their right thereto, before the Scotch court, as the competent and natural tribunal.

It may no doubt happen, in consequence of the parties wrongfully detaining or erroneously claiming right to the property being beyond the jurisdiction of the Scotch court, that the true owner cannot institute any competent process against these parties before the Scotch court. But such a case does not take from the general principle; that principle not being altered, but merely incapable of being applied, in consequence of the absence of the parties, or want of jurisdiction over them.

Now here the appellant has got a certain title in a portion of Sir Robert Preston's Scotch succession, under pretence of which she claims right to that portion of the succession, and disputes the right of the pursuers, who claim the whole succession as the general disponees and executors of the testator. The appellant is confessedly within the jurisdiction of the Scotch court; and the respondents have brought this action in order to try the question of right with her.

The general principle alluded to being, it is submitted, quite sufficient to support the competency of the pursuers action, it is almost unnecessary to aid their argument. But there are other peculiarities in this case, all tending to show the competency of the action before the Scotch court, and proving the propriety and expediency of having the question determined there, and not in England. Because the succession was a Scotch succession, and the parties interested in it resident in Scotland, the application for the appointment of the pursuers over the succession was made to the Scotch and not to the English court. The parties selected, and that by the appellant herself, to administer the succession as new trustees, were Scotch and not English. The pursuers are now administering the succession under a Scotch title, being amenable in a certain degree to the Scotch court for their whole administration. They undertook the trusteeship relying upon their acquaintance with Scotch law, and believing that their rights and duties would all be regulated by that law. They have no knowledge of English proceedings, save that they understand them to be of such a nature that it is their duty to prevent any part of this succession getting connected with English forms or proceedings, either by the funds being cast into Chancery, or otherwise.

The case is now put by the appellant on new grounds. The question of domicile is held as of no importance; the existence of the English suit, and the liability of the appellant to account under it, being treated as the decisive matter in hand. Thus then the administration of an estate would be regulated by the law of the state where the property happens to be; although formerly it was considered, not merely as matter of

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Respondents Argument.

comity, but as matter of right, that each state was bound to respect the law of the country of the domicile. Is every foreign litigation thus to impede the administration by the proper executors in the land of the domicile?

The respondents say that they are amenable for their administration to the Scotch courts, and they submit to these courts alone. Any person having a demand against them connected with Sir Robert Preston's trust or funds, whether these funds be situated in Scotland or in England, would be entitled to bring their action against the pursuers before the Scotch court. Suppose any party to pretend right to part of the English personalty which would go to exclude the right and title of the pursuers, the competent and proper court for trying the question of right between such claimants and the pursuers would be the Scotch court. Just suppose that the appellant had there moved as pursuer in her claim of right in competition with the pursuers, founding upon her right in the English funds, or any other ground, can it be doubted that her Ladyship might competently have raised against the pursuers in the Scotch court, either a counter action of declarator or any other process? Such an action would be not merely competent and regular because the pursuers are resident in Scotland: the main foundation of the action would lie in the fact that it was to try a question of right in regard to the succession of a domiciled Scotchman.

Again, if the general principle founded on be sound in itself, it matters not what is the foundation of the appellant's claim or pretence to that part of the succession, as to which the pursuers are now seeking to have their right declared. If a question of right has actually

arisen, that falls to be determined by the Scotch court. That Court will, of course, judge of the question according to the merits of the respective claims. The mere circumstance of the appellant's ascribing her claim to a certain title issuing from the English court, or to any proceeding taken in England, cannot affect the competency of the action, or interfere with the radical jurisdiction belonging to the Scotch court. It will, of course, be open to Lady Baird, as the defender in this action, to show that her English title and administration is sufficient in law to exclude the claim or right of the respondents. But the appellant has not instructed, or even averred, a relevant case upon this point. The interlocutor merely adopts the conclusion of the summons, which contains a declaration of right.

[*Lord Chancellor.*— Look to the next conclusion: that assumes that payment to the trustees would be an effectual discharge. Would that be so?]

It is thought it would; but the question here is, whether it is a correct declaration of the law of Scotland. Suppose the appellant to have acted on this declaration of right, and a creditor to sue her, she would plead plene administravit. Handing over the funds to the Scotch executors would completely discharge her.

The ecclesiastical court merely bestows administration on the party having the apparent right, or asking the letters of administration. But the ecclesiastical court has no jurisdiction to compel the administrator to execute the settlement, or administer the succession according to the will of the testator. If legatees, creditors, or others want remedy against the administrator, they must resort to the common law or equity

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Respondents Argument.

courts, generally of the country where the administrator is resident. The administrator cannot get exoneration from the ecclesiastical court. That must be sought from the ordinary courts. But these courts, when disposing of the reversion of the funds in the hands of the administrator, will of course do so according to the settlement of the testator, or according to the legal rights of the parties having a claim on that reversion. Where the succession is Scotch, the rights of the parties claiming it must depend upon the law of Scotland as arising under the will or by intestacy, while the Scotch court may competently declare or adjudicate upon any such question of right, equally after the administrator has brought his action for exoneration in the English court, as before the institution of that action. The English court will not keep a Scotch succession in England, or put it permanently under the charge of the Accountant General in England, merely because administration had been taken out in England, and a suit to have the estate administered brought in the English court.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, by the interlocutor appealed from in this case the Court of Session found and declared in terms of the first conclusion of the libel. Some question was made as to what came within the description of the first conclusion of the libel; but it is clear that it embraces so much as prayed that it might be found and declared, that all property and estate whatsoever which belonged to Sir Robert Preston in Scotland, England, or elsewhere, all debts, sums of

money due and belonging to him at his death, and all personal estate and effects of whatsoever nature, and in particular the whole funds and effects held by the appellant under the letters of administration, pertain and belong and are vested in and transferred to the pursuers, in trust for the purposes of Sir Robert Preston's settlement; and that his whole rights, powers, faculties, privileges, and immunities vested by his trust disposition and settlement upon the trustees therein named are vested in and bestowed upon the pursuers.

The appellant is the administratrix of Sir Robert Preston in England, by virtue of letters of administration from the Prerogative Court. The pursuers have been appointed trustees by the Court of Session in the place of certain persons who were named as trustees and executors by Sir Robert Preston, but who declined to act. This appointment took place with the consent of the appellant. The act of appointment is dated 19th May 1835, and is expressed to be by such consent; and it nominates and appoints the pursuers to be trustees for executing the different powers, and carrying into effect the provisions contained in the trust disposition, deed of settlement, and will of Sir Robert Preston, and that in the room and place of the trustees named by him, who had declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust deed.

In January 1836 the respondents filed a bill in the Exchequer in England, praying that the whole of the personal estate in the hands of the administratrix might be paid to them, they undertaking to pay the debts; or if the Court should be of opinion that such personal estate ought to be administered in this country, then

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

that such estate might be administered accordingly, and the residue paid to the plaintiffs (respondents) upon the trusts of the settlement.

In February 1836, the appellant, the administratrix, filed a bill in the Court of Chancery in England, praying the usual decree for the accounts and administration of the personal estate, and that the residue might be secured for the benefit of the parties interested; and that the respondents, the trustees, might be restrained from proceeding in Scotland to compel the appellant, the administratrix, to pay over the personal estate to them.

In March 1836, the respondents, the trustees, abandoned their suit in the Exchequer, and filed a bill in the Court of Chancery for the same purposes.

The effect of the interlocutor appealed from is to declare that all the funds and personal estate in the hands of the appellant, or administratrix, belong and ought to be transferred to the pursuers as trustees; that is to say, that the personal estate in this country at the time of the death of Sir Robert Preston, and now in the hands of his administratrix under letters of administration from the Prerogative Court, ought not to be administered in this country, but ought to be paid and transferred to the trustees in Scotland appointed by the Court of Session, and who are not the personal representatives of the deceased.

By the law of England, the person to whom administration is granted by the ecclesiastical court is by statute bound to administer the estate and to pay the debts of the deceased. The letters of administration under which he acts direct him so to do, and he takes an oath that he will well and truly administer all and

every the goods of the deceased, and pay his debts, so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased. The interlocutor appealed from assumes that this is not so, and that all the property in the hands of the administratrix, though unadministered, ought to be transferred to the trustees; leaving the creditors of the deceased in this country, if any such there be, and others having claims upon his property, to follow it to Scotland. It is true that so long as the appellant remains in England this declaration will be inoperative; but, as the interlocutor stands, if if she should happen to come within the jurisdiction of the Court of Session she would be liable, upon the footing of such declaration, to transfer the property to the trustees, and by so doing to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country. It is not possible this could have been intended. The pursuers, as trustees appointed by the Court of Session,—assuming that to have been properly done,—have no right to administer the estate in England as against the administratrix appointed for that purpose by the proper ecclesiastical court; and of this the courts in Scotland are bound to take notice. The confusion seems to have arisen from Sir Robert Preston having

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

appointed the same persons trustees and executors; and if they had proved the will in England, and taken upon themselves the execution of the trusts, the duties of administering the property, and of carrying into effect the trusts declared, would have been united in the same persons. It may be assumed, for the present purpose, that upon their refusal the Court of Session properly appointed the pursuers as trustees in their place, but that Court had not any jurisdiction to appoint persons to exercise the duty of recovering or administering the property which happened to be in England; that power, by the law of England, is vested exclusively in the ecclesiastical courts in this country, and can only be exercised by executors or administrators acting under their authority, and in that situation the appellant now is. Sir Robert Preston might indeed have appointed whom he pleased to administer his property in England, by naming them as executors, but he had no power to authorize or enable any persons to act in such administration otherwise than under the authority of the ecclesiastical courts. The pursuers, the trustees, have no such authority, nor has the Court of Session any jurisdiction or power to confer it. The administration of the personal estate in England rests therefore and must remain with the appellant. If after such administration shall have been completed any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers, for the purpose of being applied in the performance of such trusts; and in considering that question every attention ought to be paid to the authority under

which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being at present unascertained whether there is any surplus of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Session would be binding upon the Court of Chancery, under whose jurisdiction the property in England is placed by the suits which have been instituted. But although the transfer of the surplus of the property in England, if any, must depend upon the judgment of the Court of Chancery, it may be very competent for the Court of Session, at the proper time, to declare the rights and duties of the trustees appointed under its authority. But if such trustees have not any right or title to the funds in England until the administration shall have been completed in England and the surplus ascertained, it does not appear that any benefit can arise from any declaration of such rights and duties before it has been ascertained that there will be any surplus to which such rights and duties will attach. This, however, may be left to the discretion of the Court of Session.

The interlocutor, proceeding upon the ground that the trustees are entitled to have transferred to them the property in England before the administration has been completed, must, I think, be reversed; but as the pursuers may be entitled to some declaration of right and to some decree of the Court of Session, so far as the Court of Session has jurisdiction over the property, I think the better and safer course will be to declare that the property of Sir Robert Preston in England ought to be administered by the appellant, by virtue of the

PRESTON v. V. MELVILLE and others.

29th Mar. 1841.

Ld. Chancellor's Speech.

letters of administration granted by the Prerogative Court of Canterbury, and with this declaration reverse the interlocutor appealed from, and remit it to the Court of Session to consider and adjudicate upon the first conclusion of the libel, either separately or together with the other conclusions of the libel, as such Court shall think fit, in conformity with the above declaration.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed: And it is declared, That the property of Sir Robert Preston, baronet, (mentioned in the appeal,) in England, ought to be administered by the appellant by virtue of the letters of administration granted to her by the Prerogative Court of Canterbury: And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to consider and adjudicate upon the first conclusion of the libel, either separately, or together with the other conclusions of the libel (mentioned in the appeal), as such Court shall think fit, in conformity with the said declaration.

SPOTTISWOODE and ROBERTSON — MEGGISON, PRINGLE, and MANISTY, Solicitors.

[1*st April* 1841.]

JOHN Marquess of BREADALBANE and others, Appellants.[1] (No. 5.)

[*Lord Advocate* (*Rutherfurd*) — *John Stuart.*]

CHARLES CAMPBELL of Combie, Respondent.

[*Pemberton* — *James Anderson.*]

Entail — Institute — Irritant Clause. — The prohibitory and resolutive clauses of a deed of entail were directed against the institute nominatim and the heirs succeeding to the lands. The resolutive clause was thus introduced: "And "with and under this irritancy," &c.; and the irritant clause which followed, and was alleged by the party supporting the entail to form part of, the resolutive, was thus expressed: "And upon every contravention which may "happen by and through any of the heirs succeeding to "the said lands, their failing to perform all or each of the "conditions," &c., "or acting contrary to all or any of "the limitations," &c., "it is expressly provided not only "that the lands shall not be burdened with or liable to "the debts and deeds, crimes and acts of the heirs con- "travening," &c., "but also all debts contracted, deeds "granted, and acts done contrary to the conditions here- "of," &c. "shall be of no force, strength, or effect, and "uneffectual and unavailable against the other heirs:"— Held (affirming the judgment of the Court of Session), that the irritant clause did not apply to or fetter the institute, and that a sale of the lands by him was effectual.

A provision in an entail, declaring that the estate should not be affected, &c. by the debts or deeds, legal or voluntary, of the institute or heirs of entail, held, with reference to the context, not to import an effectual irritancy of sales.

[1] 1 D., B., & M. (N. C.)

1st Division.

Lord Ordinary Fullerton.

Statement.

DAVID Campbell of Combie, by deed of entail under the form of a procuratory of resignation, dated 25th February 1809, resigned his lands of Upper and Lower Glencrutten and others, in favour and for new infeftment of the same, to himself in life-rent, and to Charles Campbell (the respondent), "my only lawful "son, and the heirs male to be lawfully procreated of "his body," whom failing, to the heirs female of Charles Campbell, and a series of other heirs in fee.

The deed contained clauses prohibitory, resolutive, and irritant.

The prohibitory and resolutive clauses were directed expressly against the respondent nominatim, "or any "of the heirs succeeding." The portion of the entail containing the resolutive and irritant clauses was thus expressed:—"And with and under this irritancy as it is "hereby conditioned and provided that in case the said "Charles Campbell or any of the heirs succeeding to "the lands and estate before resigned shall contravene "the other before written conditions herein contained "or any of them that is shall fail or neglect to obey or "perform the said conditions and provisions or any of "them or shall act contrary to the said before written "limitations or restrictions or any of them then and in "these cases the person or persons so contravening shall "for him or herself only ipso facto amitt lose and for-"feit all right title and interest which he or she hath to "the lands and estate before resigned and as such right "shall become void and extinct so the said lands and "estate shall devolve accresce and belong to the next "heir appointed to succeed although descended of the "contravener's own body if capable to possess and "enjoy the said estate in the same manner as if the

" contravener were naturally dead and had died before " the contravention and upon every contravention which " may happen by and through any of the heirs suc- " ceeding to the said lands and estate their failing to " perform all or each of the conditions and provisions " or acting contrary to all or any of the restrictions and " limitations before written it is expressly provided and " declared not only that the lands and estate before " resigned shall not be burdened with or liable to the " debts and deeds crimes and acts of the heirs contra- " vening as is already herein provided but also all debts " contracted deeds granted or acts done contrary to the " conditions and restrictions appointed by me or to the " true intent and meaning hereof shall be of no force " strength or effect and uneffectual and unavailable " against the other heirs called to succeed and who as " well as the said lands and estate shall be noways bur- " dened therewith but free therefrom in the same man- " ner as if such debts or deeds had not been granted " or contracted or such crimes acts or omissions had " never been done or happened."

Further, in the portion of the entail immediately following the prohibitions there was a clause to the following effect:—" And with and under this restriction and " limitation also as it is hereby expressly provided and " declared that the lands and estate before resigned shall " not be affected or burdened with or be subjected or " liable to be adjudged apprised or any other way " evicted either in whole or in part for or by the debts " or deeds legal or voluntary contracted or granted by " the said Charles Campbell or any of the heirs suc- " ceeding thereto whether before or after their succeed- " ing to or attaining possession of the said lands and

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

" estate nor with for or by the crimes of omission or " commission or acts civil or criminal committed or " done or to be committed or done by them prior or " posterior to their succession."

Statement.

The respondent, as institute under the entail, having succeeded to the estate, brought a declarator of his right to sell the lands, which the substitute heirs of entail resisted on the ground that the fetters applied to the respondent; and the Marquess of Breadalbane, as purchaser of a part of the lands, brought a suspension of a threatened charge of payment. The processes were conjoined, and the Lord Ordinary (29th May 1838) pronounced the following interlocutor: — " The Lord Ordinary having heard the " counsel for the parties on the closed record in the " conjoined processes, in respect that the irritant clause " in the deed of entail libelled on is not directed " against the institute, repels the reasons of suspension, " and finds the letters and charges orderly proceeded " in the processes of suspension, and decerns; and in " the action of declarator finds, declares, and decerns " conform to the conclusions of the declarator."

Judgment of Court, 23d Nov. 1838.

The appellants reclaimed, but the Court, 23d November 1838, adhered.

The defenders and suspender appealed.

Appellants Argument.

Appellants.—The irritant clause is placed in juxtaposition to, and in truth forms continuously a part of the resolutive clause. Although they are in legal effect separate clauses, yet grammatically, and in order to ascertain the true legal construction of part of the sen-

tence, the whole is to be read as one continued sentence. The declaration that the deeds done shall be void, and that the right of the contravener shall be forfeited, is contained within one clause, in which Charles Campbell, the institute, is named in the outset as the party against whom, along with the other heirs of entail, the irritancy is directed. The rule in the Duntreath[1] class of cases does not preclude a careful examination of the instrument, or a reference from one part of it to another, so as to ascertain whether the words used are plainly meant to include the institute, it being admitted that intention is not enough, unless there are words from which such intention is plainly to be gathered.[2] Upon sound construction it must be held, that the mention of the institute in the leading member of the clause must be held to run through the entire clause above quoted.

[*Lord Chancellor.*—It has been decided that you cannot go to other parts of the deed to gather whether under the word "heirs," used in a certain clause of the instrument, the institute is included.]

But another part of the deed is important, namely, the provision that the "lands shall not be affected with "the debts and deeds of Charles Campbell, or the "heirs succeeding." This has been held in other cases as equivalent to a declaration that the debts and deeds shall be null and void. It is not necessary to say they shall not contract debt if it be said that the land shall

[1] Edmonstone, 24th Nov. 1769, Mor. 4409. See these cases collected in a note in M'Lean & Robinson, App. (1839), p. 798.

[2] Elibank v. Murray (Simprim), 1 Sh. & M'L. 1; Glassford (Dugaldstone), 1 W. S. 323; Syme v. Dickson (Blairhall), 6th July 1816, Fac. Coll.; Steele v. Steele, 5 Dow, 72.

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

Appellants Argument.

not be affected by debt[1]; and it has been held that a declaration that debts and deeds shall be null and void so far as they affect the estate, is sufficient without declaring that they shall be null and void as against the contravener.[2] Now the clause in question has been incorporated into the irritant clause, so as to be held as part of it, and if read along with it, it will thus constitute an effectual irritancy of all sales.

[*Lord Chancellor.*—The words are debts and deeds for or by which the lands may be affected, adjudged, apprised, or evicted, which do not apply to sale, which is personal.]

Respondent's Argument.

Respondent.—There must be separate and independent clauses, prohibitory, irritant, and resolutive; and however accurately two of them may be expressed, so as to include the institute, you cannot borrow expressions from them to supply a palpable defect or omission in the third. No reference can be made to other parts of the instrument to aid the construction of a clause, unless indeed when a word, used in a general sense in one clause, has been in the previous clauses used in a particular or modified sense, when the meaning of such word, though used generally but plainly in the same sense as in the previous clauses, may be controlled and explained by reference to those previous clauses where the generic term has been used in a certain limited or particular acceptation. Now the portion of the instrument introduced by the words "and with and under

[1] Mackenzie v. M'Kenzie, 23d May 1823, 2 S. & D. 293. (2d ed.); Nesbet, 10th June 1823, Ibid. 339.

[2] Munro v. Munro, 15th Feb. 1826, 4 S. & D. 467.

Respondent's Arugment.

"this irritancy," &c. embraces two distinct and independent clauses,—the resolutive and the irritant,—and the latter is directed only against the heirs of entail, which term clearly does not embrace the institute.

Then again as to the provision about affecting the lands with debts. and deeds, now for the first time referred to, it must be read with reference to its leading object, which plainly is the contracting of debt. In this view the provision applies only to debts or deeds,—acts—the consequence of which is apprising or adjudication,—and not to sales, which affect the person, and are completed by disposition, and not by adjudication. General words in deeds of entail are controlled by reference to the particular acts specified in the clause in which they occur. Besides, the clause is not truly an irritant clause at all. It occurs immediately after the prohibitory; and the general irritant clause in the after part of the deed embraces all acts of contravention by heirs of entail.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords: Nothing but the extreme caution which I think it is the duty of this House to exercise in coming to any decision, or acting upon a first impression, however strong, would have made me think it necessary to take a further opportunity of looking into this deed of entail. I have, however, since the hearing took place on the day before yesterday, looked into this deed, and I cannot suggest to myself even a doubt as to the propriety of the interlocutors appealed from. Nothing can be more simple with

[1] Henderson v. Henderson, 21st Nov. 1815, Fac. Coll., confirmed by Lang v. Lang, M'L. & Rob. App. (1839), p. 871.

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

Ld. Chancellor's Speech.

regard to a Scotch entail than that the institute is not fettered unless the irritant clauses either name him or describe him. This must be considered as perfectly settled law. Now in the irritant clause in the present deed he is not named, nor is he described. The persons whom the irritant clause describes are "heirs," and therefore, according to the decisions, the institute is not included within the irritant clause.

But then it is said, that though the word "heirs" only is used, the whole passage, including the resolutive and irritant clauses, is one sentence, and that in the commencement of the sentence there are words expressly naming the institute, which would supply the defect. Even that would be contrary to the rules which have been adopted. You cannot refer to other parts of the deed for the purpose of giving more effect to the irritant clause than is to be derived from the expressions used in the particular clause itself; but, in point of fact, though it may be grammatically one sentence, yet, in substance, the two parts are totally distinct, and form two independent clauses of the deed. The part which proceeds to impose the irritancies is quite distinct from the part of the clause which resolves the right of the contravener.

But even if it were not so, it is said that that part of the deed which was referred to at the bar contains words which would apply to the case of selling. Now I am very clearly of opinion that, according to the rule of construction adopted in several other cases, although there may be found in the sentence words which, taken from the rest of that sentence, and used by themselves, might be applied to selling, namely, by the words which speak of deeds affecting land; yet that where they are mixed up in clauses, and coupled with expressions or

words of context clearly directed to another purpose, you cannot, in the strictness required in deeds of entail, select particular words, and give a sense to them inconsistent with the general sense of the sentence itself. That the words here referred to are intended to apply to debts and deeds which might be the ground of eviction, and not to sales, is quite clear from the construction of the sentence.

In considering these interlocutors it is sufficient that the irritant clause, which professes to name the heirs of entail, does not name or describe the institute.

For these reasons your Lordships will probably concur in the opinion I have formed, that there is no doubt of the propriety of the interlocutors appealed from.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE & ROBERTSON — D. CALDWELL & Son, Solicitors.

[*6th April* 1841.]

(No. 6.) ROYAL BANK of SCOTLAND, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*) — *Sir W. Follett.*]

ADAM CHRISTIE and others, Respondents.

[*Pemberton* — *A. Wood* — *Hoskins.*]

Apparent Heir — *Stat.* 1661, *c.* 24. — *Partnership* — *Caution* — *Guarantee.* — A company having granted to a bank, in security of a cash credit, a bond and disposition in security, whereby, in addition to the obligations on the company and the individual partners thereof, two landed estates, in which one of these partners was infeft as ex facie absolute proprietor, were conveyed to the bank; and within a year after the death of that partner, a second bond and disposition in security having been granted, in consideration of an advance by the bank, whereby the eldest son and apparent heir of the deceased partner conveyed the same estates to the bank in security of that advance, and in corroboration of the first bond: — Held, (affirming the judgment of the Court of Session, proceeding on the opinions of a majority of the whole judges,) (1.) That these estates were, in the circumstances, the private property of the deceased partner, and were not held in trust by him for the firm in which he was a partner: (2.) That by the death of the partner, the firm, as it had up to that period existed, was dissolved, so far as it affected the bank, notwithstanding any special agreement between the partners that the business was to be considered as going on as before for the purpose of settling between the surviving partners and the estate of the

[1] Fac. Coll., 17th May 1839.

partner deceased: (3.) That the first bond and disposition in security having been given by the deceased partner to the bank to secure the repayment of advances made to the firm in which he was a partner, could not be used as a security for advances made after his death to a firm in which he was not a partner: (4.) That the cash credit having been operated upon subsequently to the death of the partner, in the same manner, and by the same continuing firm as before, and the account being kept by the bank as a continuous account, a balance standing against that firm at the date of the partner's death was extinguished by subsequent payments made by the surviving partners, and could not be again reared up in consequence of later drafts upon it to a greater amount: And therefore, (5.), that the second bond and disposition in security over the said estates, by the son and apparent heir of the partner, was null and void under the Act 1661, c. 24, in respect that the same was granted within a year of his father's death, not to a creditor of his father in security of any debts due by the father, but for the purpose of providing a credit for the apparent heir himself, and securing a debt of his own upon property derived by him from his father.

Observed, per Lord Chancellor, "The question, whether "under the Statute 1661, c. 24, an apparent heir can, "within a year of his ancestor's death, effectually prefer "one of the ancestor's creditors to another, by giving "him a security upon the ancestor's estate? does not, in "the circumstances of the present case, arise."

2d Division.

Lord Ordinary Cockburn.

Statement.

MR. Thomas Allan, now deceased, was a partner of a banking company, which carried on business in Edinburgh under the firm of Robert Allan and Son. The partners of this company were originally Mr. Thomas Allan and his father, Mr. Robert Allan senior, who latterly assumed as a partner Mr. Alexander Wight. and on Mr. Robert Allan's death in 1818 the business

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Statement.

was carried on by Messrs. Thomas Allan and Wight, under the same firm.

In 1812 a cash credit to the extent of 8,000*l.* was granted by the company to Mr. David Betson, Messrs. Anderson and Wilkins, London, being his cautioners; and in further security Betson granted to the company a bond and disposition in security over the lands of Campse in the county of Fife. This disposition, on which infeftment followed, was in favour of Robert Allan and Thomas Allan, the partners of the company, and the survivor and his heirs, as trustees for the company. The account opened in the company's books of the operations on the cash credit was in name of David Betson, and Anderson and Wilkins. Betson having been sequestrated under the Bankrupt Act in 1814, the lands of Campse were sold in 1816, at the price of 7,000*l.*, to Mr. Francis Walker, W. S., who declared that he made the purchase for Thomas Allan, to whom they were disponed, on 21st November and 2d December 1820, by the trustee on Betson's sequestrated estate, with consent of a majority of the commissioners and of Mr. Walker. The disposition narrated the security in favour of Robert Allan and Son, and that there was due on the cash account for which it was granted 8,587*l.* 0*s.* 3*d.*, with interest from the 16th July 1819, on account of which the creditors therein were entitled to the full price of the lands, which had accordingly been paid by Thomas Allan to Robert Allan and Son, as the receipt thereof was acknowledged by them in a disposition and assignation of the security in their favour, granted by Thomas Allan, as surviving trustee for the company, to himself as an individual and the purchaser of the lands, for the purpose of fortifying his

title to them, upon which narrative Betson's trustee discharged Thomas Allan of the price of the lands, and disponed them to him. The disposition and assignation to the security was granted on 13th December 1820, under a reservation to the company to claim the balance of the debt from Betson's personal effects. Thomas Allan took infeftment on the disposition to the lands, but not on the disposition and assignation to the security.

The price of the lands was not paid by Thomas Allan to the company. The account of the debt to the full amount was continued in the company's books, in the name of David Betson and Anderson and Wilkins, as formerly, credit being given for the proceeds and sundry bills by Anderson and Wilkins, till 11th November 1823, when there remained a balance due to the company of 8,909*l.* 10*s.*, which was, of that date, transferred to the debit of any account of the company's books, under the title of "Estate of Campse, "near Dunfermline." In making this transference, this balance was stated to be the "real cost of Campse "at this date." This account was continued, under the same title, during the whole period of the existence of the company, there being brought to the credit of it the rents received from the estate, and to its debit the outlay connected with the estate, and the expense of the title, in Thomas Allan's person, with progressive interest on the account. It was balanced annually, and the balance entered to the credit of the company's stock in the year's balance sheet, under the title of "Estate "of Campse."

In 1824 Thomas Allan acquired the estate of Lauriston in the neighbourhood of Edinburgh. The nego-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Statement.

tiations for the purchase commenced in 1823, and were conducted by Thomas Allan himself as in his own name. The missives of sale were in his own name, in which also a litigation as to the validity of the title was conducted. The disposition of the lands was to Thomas Allan individually, on which he expede a crown charter and was duly infeft. He was enrolled (on the Old Roll) as a freeholder in the county of Edinburgh under his infeftment; he arranged an excambion of part of the lands as proprietor with an adjoining proprietor, and acted and corresponded as holding the absolute property of the estate. He made extensive improvements on it, and large additions to the mansion-house, which, when finished, he occupied with his family.

In October 1823 an account was opened in the company's books, under the title of "Estate of Lauriston, "near Edinburgh." The price of the lands, which was 26,000*l.*, was provided for by the funds of the company, and the money necessary for Thomas Allan's improvements was also furnished by them. In this account the price and expenses of the sale were debited, and also payments made on account of outlay at Lauriston. In August 1825 two other accounts were opened in the company's books, the one entitled "improvements at "Lauriston," and the other "expenses at Lauriston," the former being charged with all sums paid by the company in the nature of improvements, and the latter with payments for furniture, servants wages, taxes, &c. These two accounts were annually balanced; the balance of the improvement account being carried to the debit of the "estate of Lauriston," and that of the expenses account to the debit of the account of "Thomas Allan." The estate account was also debited with public and

parochial burdens, insurance, &c., and with progressive interest stated annually; and it was credited with the sums annually received for rents; but no account was taken of the rents of the house and garden occupied by Mr. Allan. In the annual balance sheets of the company the estate of Lauriston was regularly inserted as part of their stock, according to the balance of the estate account of each year.

In August 1831, Mr. Robert Allan junior, eldest son of Thomas Allan, was assumed as a partner of the banking company, thus forming a new company under the original firm, in which the interest of the several partners were fixed on the footing that Thomas Allan was to have one half, and Alexander Wight and Robert Allan junior each one fourth share. Articles of agreement were drawn up and signed, by a clause in which it was stipulated that Lauriston be taken as Thomas Allan's own speculation, he paying the company three per cent. interest upon the cost, and upon what is or may be laid out upon the said property. It was also provided, (12th,) that in the event of the death of any partner, his heirs shall not be entitled to examine the books of the company; but the survivors shall make up a statement of the deceased's account, counting up to the first balance after the decease, and attest the same by their signatures, or oath if required; and such statement, signed and attested, shall be held as sufficient, and shall preclude any right to further examination by the heirs or others.

In March 1832 the company obtained from the Royal Bank (appellants) a cash credit to the extent of 20,000*L*, and in addition to the obligation then granted by the partners, binding themselves as a company and

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Statement.

as individuals, Thomas Allan disponed to the appellants the estate of Lauriston, in security of their advances, under the usual conditions of cash credit bonds.

Thomas Allan died on the 12th September 1833, but the business continued to be carried on by the surviving partners under the same firm. Shortly after his father's death, Robert Allan made up titles to and was infeft in the estates of Lauriston and Campse. At the date of Thomas Allan's death the debt due by the company to the appellants on the cash credit was 8,800*l.*; and on the 31st December thereafter, the date of the first annual balance of the company's accounts after Thomas Allan's decease, the debt stood at 6,765*l.* 12*s.* 1*d.* The credit was operated upon in the same manner, and under the same account in the appellants books, after Thomas Allan's death, as previously. At 29th July 1834, the balance against the company was reduced to 400*l.*, exclusive of interest; and during the intermediate period it was averred by the pursuers, that, at least at one date, there was no balance at all against the company.

In July 1834 the company applied to and obtained from the appellants an additional advance of 22,000*l.* over and above the cash credit, in security of which an heritable bond and bond of corroboration and disposition in security was granted, being made applicable to the sums already advanced or to be advanced on the cash credit, which was thereby agreed to be continued, as well as to the new loan; and, in addition to the personal obligation undertaken by the creditors as individuals, Robert Allan disponed to the appellants, under the usual conditions, the lands of Lauriston and the lands of Campse, in security of the sum of 22,000*l.*

instantly advanced and paid to the company, and also in security and in further corroboration of the former bond for the cash credit. On this bond the appellants were infeft.

The sum of 22,000*l.*, advanced to Robert Allan and Son, was immediately paid in by them to the credit of the above cash account. The firm stopped payment in the end of August 1834, and were sequestrated under the Bankrupt Act on 2d September following. The result of the operations on the cash credit, conjoined with the advance of 22,000*l.*, was to leave the company, at the date of the failure, debtors to the appellants in the sum of 42,000*l.*, exclusive of interest. Mr. Robert Christie, accountant, was chosen trustee on the sequestrated estates both of Robert Allan and Son, and of the individual partners; and on 6th October 1834 a decreet of adjudication was pronounced in his favour, as trustee, of the lands of Lauriston and Campse.

The respondents Adam Christie and others, who are creditors of Thomas Allan as an individual, or of the banking company of Robert Allan and Son previous to Thomas Allan's death, and of him as a partner thereof, with the concurrence of Robert Christie, the trustee on the sequestrated estates, brought an action in the Court of Session for reducing the bond and disposition in security of July 1834 as null and void, in terms of the provision of Stat. 1661, c. 24., against an heir making a voluntary disposition of his ancestor's estate, to the prejudice of the ancestor's creditors, before a full year had elapsed after the ancestor's death; and also for declaring that the debt due to the defenders, under the first bond and disposition of March 1832, at Thomas

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Statement.

Allan's death had been paid up, and that the lands thereby conveyed were no longer burdened therewith.

In defence, it was pleaded that the estates of Lauriston and Campse were not the property of Thomas Allan as an individual, but the property of the company of Robert Allan and Son, and held by him as their trustee, in which case there were plainly no grounds for the reductive or declaratory conclusions of the action. And even on the assumption that these estates were the private property of Thomas Allan, the security in question could not be challenged under the Statute 1661, c. 24., because it was not made to the prejudice of his creditors, but was in fact granted in favour of creditors of his, the money raised on it being paid to the company, who were such creditors, and appropriated to the extinction of debts for which he was responsible, and also because the Statute 1661 was not intended to avail creditors of the ancestors in any competition inter se. In any view of the case the security was effectual to cover the debt due at Thomas Allan's death, as it did not depend on his life, but was framed to continue after his death; and there was no dissolution of the company by his death, nor any thing to limit the application of the security by the defenders to transactions previous thereto.

The Lord Ordinary having heard parties on the closed record, pronounced the following interlocutor, adding thereto the subjoined note[1]:—

"25th March 1836.—The Lord Ordinary having

[1] "*Note.*—Under the reductive conclusion, the Lord Ordinary thinks "it clear that Campse and Lauriston must be considered as having been "the property of Thomas Allan individually. He stood as the sole

" considered the closed record and productions, and " heard parties, finds that the petitory conclusion for " rents, mails, duties, and interest was abandoned by " the pursuers at the bar; repels the defences against

---

" owner on the titles and on the record; and although his having " obtained or taken the money of his partners to make the purchases " caused accounts to be opened between them and these estates, these " accounts do not contradict the titles, but, on the contrary, in some " respects confirm them; so that, however the company might have " compelled him to pledge or sell the estates, in order to pay their " advances for the original prices, if they had claimed them as their " own during his life, this would have been a demand in which they " would have had no right to succeed.

" If this be assumed to be the fact, the question, how far the creditors " of Thomas Allan, who dealt on the faith of his apparent ownership, " are liable to be affected by any latent equities to which he may have " been subject, does not arise. He was not in the situation of trustee, " but in that of an absolute owner, liable to no such equities.

" And if so, the Lord Ordinary holds that the disposition of his pro- " perty to the defenders by his son, within a year after his death, was " an infringement of the Act 1661, c. 24. The defenders say that this " disposition was granted to one of his creditors, and that this excludes " the statute. The Lord Ordinary differs both as to the view of the " fact and of the law.

" This disposition was not to a creditor of Thomas Allan, but to the " defenders, who once were, but who had ceased to be, his creditors. On " the security of this conveyance, the defenders no doubt made advances, " which went to the house kept up by the surviving partners; and this " house was a creditor of Thomas Allan. But the advances were not " made, or meant to be made, to the house in its character of a creditor " of Thomas Allan; and the son, in disposing the estates in security, " had no view but to raise funds for the use of his own company. " Even assuming, therefore, that the debt due by Thomas Allan was de " facto diminished exactly according to the amount of these advances " (which, however, was not the case), the use to which the borrowers " chose to turn their loan cannot alter the legal character of the original " transaction.

" But even although the arrangement had been all along intended as " a pure bonâ fide conveyance of the estate, in order to raise funds for " the direct payment of one of Thomas Allan's creditors, still it would " have been struck at by the Act; at least the Lord Ordinary can dis- " cover no authority or principle for holding that that valuable statute, " which forbids an heir to affect his predecessor's estate within a year " after his death, to the prejudice of the predecessor's creditors, can be

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Statement.

" the other conclusions, both reductive and declaratory, " and decerns in terms of these conclusions; finds the " defenders liable in expenses, appoints an account " thereof to be given in, and, when lodged, remits the " same to the auditor, to tax and report."

The appellant reclaimed.

The Court pronounced the following interlocutor:— " 6th July 1836.—The Lords having heard counsel, " before further advising, appoint the parties to state " their arguments in mutual cases, to be prepared,

---

" held to be complied with by the heir's giving it all away to a single " creditor of the ancestor. It is true that a separation of the ances- " tor's creditors from those of the heir, and not any distribution between " the former inter se, forms the chief description of the general object " of the Act; but the result is an enactment, declaring that 'no right " ' or disposition made by the said appearand heir' shall be lawful, 'in " ' so far as it may prejudge his predecessor's creditors.' Can it be said " that these creditors, as a body, are not prejudged by a conveyance of " the whole property by the heir to a favoured creditor, as for example, " to a company of which he himself is a partner.

" The main declaratory conclusion, which is, that the debt due by " Thomas Allan under a prior bond was paid before the second one was " granted by the son, requires that it should be fixed, whether, in con- " sequence of the death of Thomas Allan on 12th September 1833, the " company to which he belonged was dissolved, either then or at the " next balance on 31st December thereafter. The Lord Ordinary holds " that there is nothing in the twelfth clause of their 'Notes of Agree- " ment,' which excludes the operation of the established rule, that the " death of a partner dissolves a company. The settlement with that " partner's heirs is declared to be delayed till the next balance; but, " quoad the public, the usual result is allowed to take place. And if " the partnership was dissolved by Thomas Allan's death, the defenders " don't and can't pretend that they required notice of it.

" If this shall be held to be the correct view, the principles of the case " of Devaynes v. Noble, 1 Merivale, 530, as explained by Mr. Bell, vol. ii. " p. 638, apply here; and if they do, it was agreed at the debate that " the balance due by Thomas Allan to the defenders under the first bond " was all paid prior to the granting the second one."

Statement.

"lodged, and interchanged by the first box day of the "ensuing vacation, and thereafter revised, printed, "boxed, and lodged finally, for advising of the Court, "by the second box day thereof."

Cases having been lodged, the Court then pronounced the following interlocutor: — "19th January "1837. — The Lords having advised the case, and "heard counsel, before answer, remit to Mr. Donald "Lindsay, accountant, to reconsider the books and "other documents of the late banking house of Ro- "bert Allan and Son, and to report to the Court what "evidence the said books and documents afford as "to the actual right of property in the lands of Campse "and Lauriston. Recommend to Mr. Lindsay to make "his report quam primum."

In terms of this interlocutor, Mr. Lindsay lodged a report; and upon advising the same, their Lordships appointed the following queries to be prepared for the opinions of the Judges of the First Division and permanent Lords Ordinary:—

Questions for Consulted Judges.

"1. Whether, keeping in view the state of the feudal "titles, the evidence afforded by the company's books "and other documents, and the conduct of the parties "generally, the estates of Campse and Lauriston, or "either of them, were acquired and vested in the per- "son of Thomas Allan as his own individual property; "or whether they were held by him in trust or for "behoof of the company of Robert Allan and Son, or "subject to their disposition, down to the period of his "death?

"2. Assuming the said estates, or either of them, to "have been vested in Thomas Allan in trust or for

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Questions for Consulted Judges.

" behoof of the company, or subject to their disposition, is the bond and disposition in security of 29th July 1834, under all the circumstances appearing on the record in this process, reducible in whole or in part—and if in part, to what extent is it reducible—under the Act 1661, as a conveyance granted by the heir within year and day of the ancestor's death, and to the prejudice of the ancestor's creditors?

" 3. Assuming the said estates, or either of them, to have been originally the private property of Thomas Allan as an individual, or to have become so by any subsequent arrangement or conveyance in his favour, is the said bond of 29th July 1834, with reference to the whole circumstances of the case, reducible, as above, under the Act 1661?

" 4. Whether, and to what extent, the bond of 30th March 1832 remained in force as a continuing guarantee and security over the estate of Lauriston, to cover advances, or any balance due upon advances, made by the defenders to the company of Robert Allan and Son, at or after Thomas Allan's death, and down to the date of the final sequestration of the company; or if it did not so remain in force, at what period did it cease to operate as a continuing guarantee and security over the estate of Lauriston; and whether the balance, if any, that may have been due when the said bond ceased so to operate as aforesaid, was paid, or wholly or partially extinguished subsequently?"

Thereafter their Lordships pronounced the following interlocutor:—" 6th July 1837.—The Lords having resumed consideration of this case, and heard counsel,

" approve of the foregoing queries, and appoint the " parties to give in cases upon the whole cause for " the consideration of the whole Court, and that " on the second box day in the ensuing vacation, to " be interchanged, seen, revised, and lodged on " the first sederunt day in November next; and " request the Judges of the First Division and per- " manent Lords Ordinary to give their opinions on " the whole cause, as stated in the said queries and " cases."

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Interlocutor, 6th July 1837.

The following opinions were returned by the Consulted Judges:—

Opinions of Consulted Judges.

Lord Moncreiff,—Lords Gillies and Jeffrey concurring.—Query 1.—I am of opinion, that giving due attention to the state of the feudal titles of the estate of Lauriston, and to all the evidence afforded by the books of Robert Allan and Son, and the other documents produced, and to the whole conduct of the parties, that estate must be held to have been vested in the late Mr. Thomas Allan as his own property, personally or individually, and that there is no competent or sufficient evidence to establish that it was held by him in trust for the company of Robert Allan and Son, or for their behoof, or subject to any power of disposal by them, at any time preceding the period of his death. It is no doubt apparent, on the facts disclosed, that Mr. Thomas Allan had provided for the payment of the price of that estate, and the advances connected with it, by means of money withdrawn from the funds of the company, of which he was the principal partner, and that he became debtor for the amount to the company, except in so far as there might be other sums at his credit in his private account in their books. But as such a transaction will not in itself prove a trust, in opposition to the express terms of the titles by which the property was held for years, but, on the contrary, is really inconsistent with that state of the rights between

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

the company and the individual, I am satisfied, from the whole evidence before the Court, that the purchase of the estate of Lauriston was from the beginning a private and individual speculation of Mr. Thomas Allan himself, and that he held it as his individual property till the day of his death. Indeed, it is not easy for me to conceive that it could be otherwise. In the state of the affairs of Robert Allan and Son it is very difficult to imagine that, as a company, they should have ever entertained the idea of entering on such a speculation, which was entirely foreign to their trade as bankers, or of permanently sinking so large a part of their capital in the purchase of a land estate, more especially where the titles of it were necessarily involved in perplexity, and where there was no call or inducement for them to interfere with it; and I think it still more improbable that they should have proceeded to make extensive improvements and alterations on the property, requiring large advances of money, and only reconcileable with an intention of permanent occupancy. But, on the other hand, as the purchase actually did take place by Mr. Thomas Allan individually, as the titles were completed in his person, and as he personally possessed and administered the property as his own till his death, the natural probability is very great, in consistency with the fact as it appears to me to be disclosed, that he did from the first purchase the estate for himself, notwithstanding that, from the command which he necessarily had over the affairs of Robert Allan and Son, he chose to become debtor to them for the price and advances regarding it, while he still kept his general credit with them for other purposes; and that it naturally followed, from this state of the transaction, that the accounts regarding the purchase and management of it should be entered in the company's books, and that the debt arising on it should be stated as part of their funds or assets. I see little room for doubt on this part of the case.

I have had more doubt as to the estate of Campse. There was originally no speculation whatever for the purchase of that estate, either by Mr. Thomas Allan or by the company. The company had held an heritable security over it for debt.

Upon a bankruptcy of their debtor, either they or Mr. Allan at last found it for their advantage to take the property for the debt, otherwise bad. The conveyance was taken to Mr. Thomas Allan; and if the entries in the books as to this estate had stood by themselves, though not correctly agreeing with the idea of a right of property in the company, there might perhaps have been strong ground for inferring that the real meaning was that he should hold in trust for the company. But when I observe the very strong fact, that a disposition and assignation of the heritable security which the company held was executed by their trustee in favour of Mr. Thomas Allan, in corroboration of his title as proprietor, in terms very strongly importing the acquisition to have been made as for himself,—a measure altogether unnecessary and inconsistent, if the title was a trust for the company,—I am not able to arrive at that inference; while, at the same time, the entries in the books being nearly the same with those regarding Lauriston, must be liable to a similar explanation as in the other case. Although with some hesitation, therefore, I think that the estate of Campse also must be considered as having been the individual property of Mr. Thomas Allan, there being no evidence of a trust sufficient, in my opinion, to control the state of the titles.

Query 2.—This question seems to assume hypothetically the point to which the third query more particularly relates, namely, that the Statute 1661, c. 24. is effectual to annul the bond and disposition in security of 29th July 1834, on the supposition that the estates, or either of them, did stand in the person of Mr. Thomas Allan as his private property. And I understand the question to import this inquiry, whether, supposing the statute to be applicable in that case, its application would be excluded, if the estates, or either of them, were held to have been vested in Mr. Allan in trust for the company?

It is evident that this question will be entirely superseded if it shall be held that both estates were the property of Mr. Allan individually. But, in order to exhaust the questions on which the opinions of the consulted Judges are

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

asked, it may be necessary to answer the question hypothetically, notwithstanding the opinion above expressed. And, without entering into detail, I am of opinion, that if it should be held that the estates of Campse and Lauriston were truly the property of the company of Robert Allan and Son, and only vested in Thomas Allan as in trust for that company, or if either of them was so, the statute founded on would to that extent be altogether inapplicable to affect the validity of the bond and disposition in security to which the question relates. For if either estate was held in trust for the company, the heir of Thomas Allan, the trustee, in granting that bond and disposition in security, would be only applying the trust estate to the purpose for which it was held, and fulfilling the special duty and obligation of his ancestor, by making the estate available to the company, whose property it truly was. And I apprehend that, however the statute may be construed in other respects, it never could be intended to prevent the heir from duly implementing the trust obligations to which his ancestor was liable for that precise end.

It may be right, however, here to observe, that there is no question raised in the present case upon any of the other bankrupt statutes, or upon the common law. And therefore it appears to me that a great deal of argument, attempted to be sustained in the revised case for Christie and others, by reference to various well-known cases, is altogether inapplicable to the case now before the Court. No question is or could be raised, as in the event of a bankruptcy of Thomas Allan holding this estate in trust, or even as in the case of a bankruptcy of Robert Allan, his heir, at the date of the bond and disposition in security, or within any statutory time thereafter, because no such event or case has existed. The question is only on the peculiar statute 1661. And I am decidedly of opinion, that that act never could, on any construction, be applied to a deed of the heir, by which he bonâ fide gave simple implement of a special trust which had stood in the person of his ancestor.

Query 3.—This question appears to me to be of very great importance, and to be attended with considerable difficulty.

Before the Act 1661, c. 24. was passed there was no law by which the creditors of an ancestor deceased had any preference over the creditors of his heir on the estate which had belonged to his ancestor. The estate becoming the property of the heir was open to the diligence of all alike, without any limitation of time, subject to the bankrupt laws then existing. Neither was there any law which restrained the heir from granting any disposition, whether within the annus deliberandi or not, either to an onerous creditor of himself, or to an onerous creditor of the ancestor. And certainly there was no law which rendered it incompetent for any one creditor of the ancestor to obtain from the heir a disposition, either in security or in payment of his debt, in the same manner as he might have obtained such a deed from the ancestor himself. That act 1661 made certain provisions in regard to the two first of these cases. But the question is, whether it made any provision in regard to the last?

It appears to me to be very necessary to attend to the whole words of the statute. The enacting words in all parts must surely be considered, with reference to the preamble, in which the inductive causes, and the evils to be remedied, are set forth. To judge correctly, therefore, of the effect of it, the whole words ought to be constantly before us. The Estates of Parliament, "taking into consideration, that ap- "pearand heirs, immediately after their predecessor's death, "do frequently dispone their estate, in whole or in part, in "prejudice of their predecessor's lawful creditors, before "their death come to their knowledge, or before they can "do lawful diligence against the saids appearand heirs, and "which dispositions the said appearand heirs do often make "before they be served heiris and infeft; or otherwayes by "collusion they suffer their predecessor's estates to be com- "prised or adjudged from them for payment of their own "proper debts, real or simulat, without respect to their pre- "decessor's creditors; and his Majesty, considering how "just it is that every man's own estate should be first liable "to his own debt before the debts contracted by the appear- "and heirs; therefore his Majesty, with consent foresaid, "declares that the creditors of the defunct shall be pre-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

" ferred to the creditors of the appearand heir in time " coming, as to the defunct's estate, provided always, that " the defunct's creditors do diligence against the appearand " heir, and the real estate belonging to the defunct, within " the space of three years after the defunct's death: And " because it were most unreasonable that the appearand heir, " when he is served and retoured heir and infeft respective, " should, for the full space of three years, be bound up " from making rights and alienations of his predecessor's " estate; and yet it being as unreasonable that he should " dispone thereupon immediately, or shortly after his pre- " decessor's death, in prejudice of his predecessor's credi- " tors, he having year and day to advise whether he will " enter heir or not; therefore it is hereby declared, that no " right or disposition made by the said appearand heir, in so " far as may prejudge his predecessor's creditors, shall be " valid, unless it be made and granted a full year after the " defunct's death."

I find it exceedingly difficult to discover in the whole scope of this statute, that it had any other object than to secure a preference to the creditors of the ancestor over the ancestor's estate, against the creditors of the heir or others transacting with him. There are two ways mentioned in the preamble, by which the heir might unduly apply the estate in payment of his own debts. One was by granting dispositions to the prejudice of the predecessor's creditors; the other was by collusively suffering the estate to be adjudged for his own debts, without respect to the predecessor's creditors. Contemplating these two cases, the Legislature specially, because it is just that every man's estate should be first liable for his own debt before the debts of his heir, enacts generally, " that the creditors of the defunct shall be " preferred to the creditors of the appearand heir in time " coming," &c. under the condition, that the former do diligence within three years. This provision secured the creditors of the ancestor against any diligence to be used by the creditors of the heir; and it has been held, though there might have been and was doubt on the words, that it secured them also, if their diligence were used within the

three years, against any disposition to a creditor of the heir, even though granted beyond the annus deliberandi. But the act, in regulating the first point referred to in the preamble, on the narrative that it would be unreasonable that the heir should be tied up from disponing for the full period of three years, and yet unreasonable also that he should dispone immediately or shortly after the predecessor's death, in prejudice of his predecessor's creditors, provides that no right or disposition by the heir, in so far as may prejudge his predecessor's creditors, shall be valid, unless it shall be made a full year after the predecessor's death.

The natural construction of this last part of the act seems to be, that it is the mode of giving effect to the first part of the preamble, taken in connection with the general enactment, "that the creditors of the defunct shall be preferred "to the creditors of the heir in time coming;" and it seems to be scarcely reconcileable to any principle for construing such a statute, to assume, that the last part of it was directed to an entirely different object, of creating an absolute equality amongst the creditors of the ancestor themselves, or preventing the heir from satisfying the debt of any one of them. It is very clear that, in the point of diligence, it presents no obstacle whatever to one creditor of the ancestor obtaining a preference over the rest, by completing diligence within the year or within the three years; and I find it very difficult to infer the design of creating such an obstacle in regard to the powers of the heir, from the words of a statute, which in its plain purpose and intention contemplates only prejudice to the creditors of the ancestor with reference to the heir and his creditors.

I am well aware, that the application of the statute has not been confined to deeds done directly for the benefit of the heir's creditors. A sale of the estate has been found liable to challenge under it, at least if the price has been paid and is not extant. I know also that though Lord Stair[1], in his first edition, had said that after the year dispositions in favour of the heir's creditors would not be excluded by

[1] 1 More's Stair, 375.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

diligence of the ancestor's creditors used within the three years, the contrary was early decided, or at least held, according to the note of Harcarse to the case of Arniston against Lord Ballenden; and that the passage is accordingly left out in the second and following editions of Stair's work; and the point has been so held by all later authorities. It further appears that though at first it was decided in the case of Ballenden v. Murray, March 1685, Mor. 3127, that a disposition granted by the heir to one of his own creditors after the year, but within the three years, was preferable to creditors of the deceased, who had not obtained complete diligence within the three years, the contrary was long ago ruled, and may be considered as clear law. Taylor v. Lord Braco, 26th November 1747, Mor. 3128.

But these points do not at all touch the present question. In all of them there was a clear contemplation of that which was the object and design of the statute, the protection of the creditors of the ancestor generally against the application of the estate by the heir to other purposes before their debts were paid, or before they had a reasonable time for making them effectual. I have looked in vain for any authority, either in the institutional writers prior to Mr. Bell, or in any distinct judgment of the Court, for any recognition of this point, that this statute renders it incompetent for the heir within the year to satisfy or secure a creditor of the ancestor, by means of the ancestor's estate.

This Act of Parliament is adverted to by M'Kenzie, without indicating any such idea. It is treated of in three or four different parts of Lord Stair's Institute, and in none of them is it said that the act was intended to regulate any thing among the creditors of the ancestor themselves, or that a disposition to one of them within the year, not challengable upon fraud, could be reduced in virtue of it. Lord Bankton also speaks of it in different places, but nowhere expresses the idea. On the other hand, the authority of Mr. Erskine is quite clear and express, that the act "does not bar the "heir from disponing, even within the year, any part of the "ancestor's estate to a creditor of that ancestor." Ersk. b. iii. t. 8. § 102. There is a case referred to at the end of

the sentence which has other matter in it. I shall advert to that case. But in the meantime this is the doctrine explicitly laid down by Mr. Erskine, our highest modern institutional writer, in the full knowledge undoubtedly of all that had been written and decided before his time. He gives it as the law of the statute; and the weight of it as authority in the question lies in the high authority of the writer himself. But the strength of it becomes still much greater, when it is considered that the law so laid down has stood absolutely uncontradicted from that day to this by any one decision of the Court; and it is indeed scarcely conceivable that the question should not have arisen if it had not been understood and believed that the law was so settled.

Any opinion delivered by Mr. Professor Bell, who has rendered such inestimable service to the law of Scotland, is undoubtedly entitled to the most grave and deliberate consideration, and I certainly am very far from treating lightly what he has said on this subject. But I must observe, that it was not till a late period that that most learned and able commentator took up the view on which the pursuers now rely. For even in his third edition, published in 1819, he assumes the point to be perfectly clear, in the same manner as Erskine states it. He there says, "It need scarcely be "added, that the rule of this statute has no application "either, 1, where the security is granted to a creditor of the "ancestor; or, 2, where the challenge is maintained only by "the creditors of the heir[1];" and he quotes the very case in Harcarse referred to by Erskine, as having decided "both "points." The fourth edition of Mr. Bell's Commentaries was published in 1821. Mr. Bell there expresses only a doubt whether Mr. Erskine may not have too much extended the doctrine in the case reported by Harcarse; and adds this sentence,—"I should be inclined to expect, that if such a "conveyance to a single creditor were challenged by the "body of the creditors of the ancestor the act would be "found to apply."[2] But no authority for this is referred to;

[1] 2 Bell's Comm. 404. (3d ed.)
[2] 1 Bell's Comm. 633. (4th ed.)

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

nor does the learned author proceed on the idea that any direct authority for it existed.

By the time, however, that Mr. Bell came to publish his last edition in 1826, although it does not appear that any case on the subject had intervened, he had, no doubt under a feeling of full conviction, taken up a stronger view of the point. For he there expresses himself thus,—that "it seems "very doubtful whether Erskine had not too indiscriminately "extended the doctrine of the court as laid down by "Harcus, when he says that a conveyance to a creditor of "the ancestor is unexceptionable. If such a conveyance "to a single creditor were challenged by the body of "creditors of the ancestor, the act would unquestionably "entitle the rest to challenge the deed."[1] With all possible respect, I must think that this is advancing rather too rapidly, as there is certainly no adjudged case yet which impeaches the doctrine laid down by Mr. Erskine, and repeated by Mr. Bell himself at the distance of forty-six years.

Now, whatever views may be entertained as to the expediency of establishing some such rule of law as that contemplated, the question to be determined is, whether this statute, entirely directed, as I think, to a different object, has given that rule. I am not able to find it either in the words or in the spirit of the statute; and though there might be expediency in the arrangement of some law on the subject, I think that it would require a good deal of consideration of the peculiarities of the case, before such an unbending and unqualified rule as that which is now said to have existed for centuries in this statute, though altogether unknown to our institutional writers, should be laid down.

Two cases have been alluded to as having some relation to the point. One is that which is mentioned at the end of the passage in Erskine, Lord Ballenden v. Murray, March 1685 (Mor. 3127.) It will be observed, that there are two points in the sentence of Erskine to which the reference is subjoined. One is, that the act does not bar the heir from disponing within the year to one of the ancestor's creditors.

[1] 1 Bell's Comm. 736. (5th ed.)

The other is, that no creditor of the heir has any interest to object to a right granted to another creditor of the heir within the year. The case referred to distinctly supports the last proposition, but it has been thought not to make out the first. Whether it was referred to with that view may be doubtful. Mr. Erskine might express his own decided opinion on the effect of the statute in that point, as he here does, without meaning to say that it had been precisely decided. But though the words of the report may not seem to bring out the point, it does not follow that it may not have been perfectly well known to Erskine, that that was the nature of the case, and that it was so understood by the profession in his time. The words of the report are:— "In this process it was also found, that a disposition granted "by the heir to the defunct's creditors, within a year after "the defunct's decease, was not quarrellable, seeing the "clause of the Act of Parliament is conceived in favour of "the defunct's creditors." It is not a usual thing for an heir to execute a disposition in favour of the whole body of his predecessor's creditors; and I think it very improbable that such was the fact in that case. The case is not so stated in the report, the party engaged in it being described simply as an individual. And indeed if such a disposition to the body of creditors had been granted, I should have thought it so clear that no objection could have been taken to it under the statute, that no discussion on such a question could well have arisen, seeing that no one could have a title to challenge it; and therefore I should rather infer, notwithstanding the generality of the terms of the report, that the real meaning was, that a disposition to any of the defunct's creditors was unchallengable, as Mr. Erskine may have understood it. But if a deed to all the creditors could be challenged with any apparent relevancy, and if any sort of prejudice could be qualified, the judgment must import at least, that the words of the statute "that no right or dispo-"sition," &c. "shall be valid," &c. were not understood in the absolute sense now maintained by the pursuers. At all events, there is nothing in the report in the slightest degree

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

adverse to the doctrine delivered by Mr. Erskine, as what he held to be the clear law on the subject.

The other case mentioned is that of the Laird of Arniston v. Lord Ballenden, November 1685 and March 1686, (Brown's Supplement, ii. p. 92.) Though the report of that case is by no means luminous, I cannot help thinking that the very existence of it goes far to demonstrate that the disposition referred to in the case of Ballenden v. Murray could not have been a disposition in favour of the whole creditors of the deceased; for the party challenging Lord Ballenden seems to have been the same; and this later case relates to another disposition in favour of other creditors of the father. However this may be, the facts of Murray's case not being stated, the question with Lord Arniston certainly did touch the point. There was a separate defence against the reduction; viz., that the granter of the disposition was not an heir-apparent, having taken the estate per præceptionem hæreditatis fifteen years before his father's death. But, on the supposition that that ground might not avail, the plea was first distinctly stated, that "the act prohibiting "dispositions within year and day of the predecessor's "decease in prejudice of their creditors is not designed to "make a party amongst them, but only to prefer them to "the creditors of the heir." The Court at first sustained the defence, that the son had been infeft in his father's life-time, "but waived to give answer to the first reason; viz., "If any of the father's creditors could be gratified." The debate was afterwards resumed on the point decided in the defender's favour. The Court were then divided in opinion on that point, and Lord Ballenden found it necessary to consent to Arniston's preference for his proper debts, so that "the first interlocutor stood as to him; but the Lords "reduced, quoad the other creditors, whom Arniston had "some time after his disposition assumed." The reporter adds, "which seems somewhat inconsequential."

As the first interlocutor stood as to Arniston, it certainly stood on the same ground on which it had proceeded, that the son had taken per præceptionem; and in this view the

other point remained as it had been before, waived by the Court; and, accordingly, it is not at all mentioned in the abstract of the resumed debate. The judgment of reduction as to the other creditors does not affect it, as it evidently must have proceeded on the ground, so far as I can understand the case, that those other creditors had not been validly assumed into the benefit of the disposition,—in other words, that there was no effectual disposition in their favour, though there was a valid disposition to Arniston, who was no more a creditor of the ancestor than they were. As this appears to me to be the truth of the case, I think that the judgment does not affect the present question; but indeed, if it could be viewed in any other light, the proceeding would be altogether unintelligible, and certainly would not aid the pursuer's argument; for it would come to this, that because Lord Ballenden, a single creditor of the ancestor, consented to Arniston, another creditor, being preferred, the Court gave judgment sustaining that preference, to the exclusion of all the other creditors of the deceased, who were parties litigants before them. It is impossible that this could be the state of the case, unless the very question here in discussion had been decided in favour of the single creditor holding the disposition. I do not think that it was so, and have no doubt that the case must be explained in the way I have mentioned.

On the whole matter, seeing no authority for any other construction of the statute, I am of opinion that, according to the terms and spirit of it, the law on the question is that laid down by Mr. Erskine. And it does also appear to me, that the other construction maintained, which holds all dispositions whatever by the heir within the year to be invalid, would lead to very extraordinary consequences, as it would imply that the heir, even when he had completed his title within the year, could not give implement even of the most onerous obligations of his ancestor, without waiting till diligence should be used against him; and that any disposition granted even for such a purpose would be liable to reduction, at the instance of any unknown creditor of the ancestor who might lie by, at any time within forty years,

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

a thing which I cannot think was contemplated by the statute.

If the Act of Parliament does not apply to dispositions in favour of a creditor of the ancestor, I am of opinion that the bond of 29th July 1834 is not reducible under that Act; for that deed was evidently a deed granted in security of money advanced to pay the debt pro tanto which Thomas Allan owed to the company of Robert Allan and Son; and, as far as I can judge of the matter, if it were necessary to go farther, I am convinced that the facts brought out in the accountant's report would establish that the money was in a great measure, if not wholly, employed by the company in the payment of debts for which Thomas Allan himself was responsible.

Query 4.—This question also appears to me to be attended with considerable difficulty.

I am of opinion that the company of Robert Allan and Son, which was constituted by the minute or notes of agreement of 29th August 1831, must be considered as having been dissolved, in regard to any question concerning the estate or the proper representatives of Thomas Allan, by his death on the 12th September 1833, or at least at the 31st December thereafter. The contract was not of such a nature that the parties severally contracted for themselves and their heirs. It is indeed indefinite in endurance; but, so far from supposing that the company was to continue unchanged on the death of one of them, it expressly provides that the heirs of the deceasing partner shall not even be entitled to look into the books, and that their interest in its funds shall be at once determined by the balance to be made up by the survivors at the time appointed. It may probably be true that the surviving partners must be considered as still the members of a subsisting company between themselves. There is no question here as to their obligation to continue partners with one another; though, in an agreement of indefinite endurance like this, this might admit of much doubt. But the question before the Court is of a more limited nature, relating merely to the change in the state of the company produced by

Thomas Allan's death, in regard to him, or the rights of others with relation to him or to his estate.

Neither can I think that the company must be considered as unchanged in this question, because the same firm was continued, and there was no notification of a dissolution. Death operates a dissolution of itself; and being a public fact, all men are bound to know it. See the doctrine laid down by Lord Eldon, as quoted by Mr. Bell, vol. ii. p. 639. But in the present case, surely the Royal Bank cannot plead want of notice of Thomas Allan's death, when they took their disposition of his estates from his son and heir; and knowledge of the death must presume notice of the dissolution, unless the fact had stood otherwise by the contract. But though the son was still a partner of the succeeding company, he was so, not as heir of Thomas, but in his own capacity in terms of the contract; and of this also the deeds executed gave the Bank full notice.

It may be doubtful whether the dissolution should be considered as having taken place at the moment of Thomas Allan's death, or not till the 31st December 1833, when the balance of the books was made. I have had hesitation on this point; but, on the whole, I am inclined to think that the company, though in the process of winding-up, must be considered as having gone on till the time for striking the balance; because till that time the representatives of Thomas Allan, as such, had still an interest in the transactions.

But assuming that there was a dissolution of the company of which Thomas Allan was a partner, this does not exhaust the subject of the query put to us. Two points remain of considerable nicety.

The defenders maintain that the special security given by the deed of 30th March 1832, having been so given upon a cash credit to the company trading by the firm of Robert Allan and Son, must subsist to the effect of covering the operations under that credit, notwithstanding that by Thomas Allan's death the actual company had come to be different from what it was before. I do not think it a good answer to this plea to say that it would be enabling the

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

heir to apply the estate of the ancestor within the year to the payment of his own debts; because this does not stand on any disposition by the heir, but on the disposition by the ancestor himself; and if he chose to convey his estate in security of debts to be contracted even by third parties, there is no doubt that it would be effectual to the creditor, whether the granter was alive or dead, as for a debt arising on the credit of that special security given by him. The question, therefore, is not free from difficulty.

On the whole, however, I am inclined to think that the bond of security granted by Thomas Allan ought not to be construed as having been truly intended as a security for any cash credit except to the company of which he himself was a partner; and that therefore it should be held to have ceased to be a fund of credit, as soon as his death dissolved the connexion between him and the company bearing the firm. It was in reality an obligation of guarantee—an impledging of his security for a special object. He happened to be a partner of the company in whose behalf it was given; but he might not have been so, and still might have given such a security. In such a case, there can scarcely be a doubt that a guarantee or security, given for Robert Allan and Son, while A. B. was a partner of that house, would not have been effectual to cover advances made to a company bearing the same firm after that person had ceased to be a partner of it. The principles of the case of Houston's Executors v. Spiers, &c., 4th March 1820, seem to imply this.

But, besides this view of the matter, it is to be observed, that if there was a dissolution of the first company, or a change which rendered the firm of Robert Allan and Son in reality a new company, the personal obligation in the original bond by the old company must truly have fallen as to Thomas Allan, however it might subsist against the new or continued company, and the individuals who still operated on the credit. And if the personal obligation of the company for whom Thomas Allan interposed the security of his heritable estates had fallen, it cannot be held on any sound principle that the special security so interposed could

subsist, for advances made after this essential change on the effect of the credit had taken place.

The second point maintained by the defenders in this part of the case appears to be more important; and I am inclined to think that it is well founded.

The pursuers very anxiously maintain, that this case is altogether within the principle of the well known case of Devaynes; and that if they can show that at any time after the death of Thomas Allan the payments made by the surviving firm into the cash account were sufficient to pay all the balance which was due at the time of his death, or at the striking of the balance, that debt must be held to be swept away, and all the debt remaining at the time of the bankruptcy must be taken as the debt of the new company, and so the debt of the heir, and not of the ancestor. It appears to me, that there is considerable confusion in the argument of both parties on this question; and my opinion is, that the case of Devaynes does not apply in the circumstances in the extent pleaded. In that case, a private party had money deposited with a company of bankers; at a certain point of time, one of the partners of that company died. This was taken clearly as a case of dissolution; but the party went on to deal with the new company on the same account, and from them he received all that had been due at the death of the partner. After that he made further deposits; and then a bankruptcy of the new company took place, while the balance was considerably in favour of the depositor. The claim made was against the representatives of the deceased partner; and this was held to be inadmissible, because the first payments made, after the creditor had acknowledged by his deposits and drafts the continued account with the new company, were considered as applicable to the debt as it stood at the death of the partner, and therefore to have extinguished it.

It is very difficult to assimilate the present case to that case. There is a puzzle in the argument of the defenders, not altogether sound, arising from the circumstance of there being here two banks, constituting the debtors and creditors in the account. But still there is a real difficulty.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

The claim arises on the account kept in the Royal Bank. But they are not the debtors as in the case of Devaynes, but the creditors; nor was Mr. Thomas Allan the partner of that corporation, whose death could have raised any question. The Royal Bank are creditors of Robert Allan and Son, not upon any money simply deposited with them, but on payments made in answer to draughts which were recognized only in respect of the special security held from Thomas Allan. Now, if there was a dissolution of the company for whose behoof that security was granted, and if the Royal Bank, erroneously believing that the security was still available for new advances to a different company, allowed the account to go on without closing it, and afterwards came to be greatly in advance to the new company, it would be contrary to all equity that the accounts should still be blended together, and that the bank should be deprived of the benefit of their security, derived specially from the deceased partner, even for that part of the debt which was truly due to them at the time of his death. On the most common principles, since the security has been found unavailable for the subsequent advances, they are entitled, when the accounts come finally to be adjusted, to impute the payments to the debt least secured, and to resort to their security for that debt to which it is clearly applicable.

I am sensible that the judgments pronounced by the Court and the House of Lords, in the second branch of the case of Houston's Executors v. Spiers and others, may also deserve attention. But it rather appears to me that there is also an important difference between that case and the present. The payments, which this Court held might at certain points of time diminish the debt existing when the change in the mode of transacting was made, which had been held to liberate the cautioners from the subsequent drafts, were all payments by the same party who had contracted the first debt. He made the remittances, and all the drafts both before and after the change were his; and the Court were of opinion that such remittances made by him might justly be imputed to any part, or the earliest part, of his drafts. But the state of the matter is quite different here. The first

debt was contracted by one company, that of which Thomas Allan was a partner, and for that the Bank held the security of his estate. The payments which are now said to have extinguished it were made by another company on their own account; and on the faith of those payments, if not on that of the special security, that other company received credit for the further drafts made by them. This is a very different affair from that of one party making drafts and making payments. If the companies are found to be different parties, their payments, no more than their drafts, can be confounded. There is a special security for the debts of the one; none for those of the other. Is it just at once to take away the security from the debts of the new company, and to make their payments liquidate the debt of the old company, while the debts contracted by themselves to the same party are left unpaid and unsecured? There is plainly an essential difference between this case, and both the cases of Devaynes and Houston; and, I think, a difference entering into the essential equity of the whole matter. Nevertheless, I feel all the doubt attending the question.

But, on the whole, I am inclined to think, that the principle of the cases of Devaynes and Houston cannot in this point be made to apply to the present case; and that the defenders are entitled to the benefit of the security for whatever debt was due at the time of striking the balance on the 31st December 1833, after the death of Mr. Thomas Allan.

Lord Corehouse.—I concur with Lord Moncreiff in the answers which he has given to the first two questions.

The third question appears to me, as it did to his Lordship, to be of great importance, and attended with difficulty.

Mr. Erskine has said, "that the Act 1661 does not bar the "heir from disponing any part of the ancestor's estate to a "creditor of that ancestor[1];" and if he had stated this on his own authority alone, it would have been entitled to great weight, as the opinion of a very learned and experienced

[1] Ersk. 3. 8. 102.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

lawyer; but he rests it on the authority of a decision, in a cause in which the creditors of Lord Preston and of his son John Preston were parties. In the competition which occurred on that occasion various judgments were pronounced; and on a careful examination of the reports in Harcarse and Fountainhall, it occurs to me, that while the judgment to which Mr. Erskine particularly refers gives no countenance to this dictum, the others are directly opposed to it.

Lord Preston disponed his lands of Preston and Auchindinnie to his eldest son John Preston, with the burden of his debts. The disposition was dated fourteen or fifteen years before Lord Preston's death, and infeftment was expeded by the disponee under the great seal in his father's lifetime. After Lord Preston's death, some of his creditors proceeded to do diligence, and they had gone so far as to obtain decree cognitionis causâ within three years from that event, but their decree of apprising was not pronounced till afterwards. It appears that John Preston, the son, had granted a disposition to Murray, one of his own creditors, within the three years; and that he had also granted a disposition to his uncle, Dundas of Arniston, one of his father's creditors, for the behoof of Arniston himself, and such other of the father's creditors as he chose to admit to the benefit of it. Arniston granted a back bond, acknowledging the trust, and assuming a certain number of creditors.

The first question that arose was between Lord Ballenden, one of the father's creditors, and Murray the son's creditor, who had obtained the disposition; and it was found, "that "the defunct's creditors ought to do exact and complete "diligence against his estate, within three years after his "death, unless they could make it appear that their diligence "was retarded without any fault of theirs, by opposition "from the heir or other creditors, or the surcease of justice, "or the like; and preferred a disposition by the heir to one "of his creditors, even within three years after the defunct's "decease."[1]

[1] Harc. 219.

The next question was, whether a disposition granted by John Preston to his father's creditors, within a year after his father's death, was effectual against his own creditors, on the ground that the Act 1661 prohibits all dispositions within that period? The Court found, that the son's creditors had no title to challenge that disposition, "seeing the clause in "the act is conceived in favour of the defunct's creditors, "and not of the creditors of the heir." [1] It was also found, on the same principle, that a disposition by the heir to one of his own creditors could not be challenged by another of his creditors. This ended the competition between Lord Preston's creditors and those of his son. It is the only case to which Erskine refers, and it has manifestly no relation whatever to the present question. Indeed this is now admitted on all hands.

A second competition then commenced of the father's creditors inter se. After disposing of an objection to an inhibition used by Lord Ballenden, one of the number, which was held effectual only to a certain extent, the question arose, whether John Preston's disposition to his uncle Arniston, with power to assume other creditors, was exposed to challenge at the instance of the remaining creditors not assumed under the Act 1661? Lord Ballenden argued,—"The act is clearly conceived in favour of the defunct's "whole creditors, as appears from the motives therein ex-"pressed, viz. that it takes some time before his death can "come to their knowledge; and it is but just, that as the "apparent heir is secure for year and day against all dili-"gence at the instance of the defunct's creditors, so it "should not be in his power to prejudge them during that "space by preferring some to others." [2] No answer was made to that argument. Arniston rested his defence on a totally different ground; he maintained, that John Preston being put into the fee many years before his father's death, the Act 1661 did not apply to him at all. "The act," he says, "is "expressly in the case of apparent heirs disponing, and the "son being in the fee cannot be served heir to his prede-

[1] Harc. 219. [2] Harc. 29.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

"cessor, who was deceased (denuded) before his death; "and as the father might have preferred such creditors as he "pleased, there being no diligence used against him, the "son might do the like in the father's life, or immediately "after his decease, the power of disponing being the effect "of dominion."[1] The interlocutor on that debate is given verbatim by Fountainhall: "The Lords found that John "Preston was not in the case of an apparent heir, but of a "qualified fiar, under the provisions and obligements con-"tained in the disposition made to him by his father, and "so (notwithstanding the 24th Act of Parliament 1661) he "might sell and dispone on his lands within year and day of "his predecessor's death; and that the disposition was not "quarrellable on that head, the son being always infeft on "the said disposition before his father's death."[2] Some of the Judges doubted of that interlocutor, because John Preston was not an absolute but a qualified fiar, his father having burdened him with all debts he should contract even in articulo mortis; and it was said, that since "the son is "declared liable as if he entered heir, so he cannot more "than an heir dispone within the year." But no doubt whatever was expressed, if he was to be held not as a fiar, but as an heir, and therefore within the provision of the Act 1661, that the disposition granted by him to Arniston and the assumed creditors, in prejudice of the other creditors of Lord Preston, would have been null, as falling under the prohibition.

Lord Ballenden waived his plea that John Preston was an heir and not a fiar; and the interlocutor in favour of Arniston stood on the ground on which it was originally placed. But another question occurred with the assumed creditors, which did not rest on the Act 1661—it had no connection with that Act. If it had been held that John Preston, being an heir, could dispone effectually to Arniston without contravention of the Act, it would have followed necessarily that he could have disponed to any other creditor he chose, or any whom he had empowered Arniston to choose. But in the question

[1] Harc. 29. [2] 1 Fount. 367.

with them the challenge was laid not on the Act 1661, but on the Act 1621. Fountainhall reports[1], that "the third "point represented against Arniston's disposition was, that "it was from a nephew to an uncle, without adequate "causes; that by his posterior back bond he had gratified "some of the creditors to the prejudice of others who had "done diligence, which was found unlawful, as Stair ob- "serves: 8th January 1669, Preston; 24th July 1669, "Young." The result of that discussion is given by Fountainhall[2]:—"The Lords thought the reason relevant on the "Act of Parliament 1621, that Arniston could not assume "personal creditors before Ballenden, nor prefer any debts "paid by himself since the disposition, but only those to "which he had a right at that time, and therefore preferred "Ballenden, who had inhibited to the rest, although the "inhibition was found null quoad one of his debts. There "was cited for Ballenden these decisions from Stair: 8th Ja- "nuary 1669, Newman; and 24th July 1669, Crawford. "The words of the interlocutor were:—'The Lords found "'that Arniston by his back bond could not prefer one "'creditor of Preston's to another, but conform to their "'diligence. But that as he might have received payment "'of all his own sums, so he might prefer himself as to all "'debts due to himself at the time of the disposition of the "'lands of Preston, or at the time of the disposition of the "'lands of Auchindinnie, which were both anterior to his "'back bond; and therefore sustain the reason of reduc- "'tion at my Lord Ballenden's instance against Stobs and "'the other creditors therein called, founded upon Ballen- "'den's prior diligence; and in respect thereof prefer him "'to them, notwithstanding of the preference given to "'them by the foresaid back bond, and ordain the Lord "'Ballenden to be ranked accordingly.'"

The cases of Newman and Crawford, here referred to, are reported at length by Stair; and there is an able commentary upon them in M'Kenzie's Observations on the Act 1621. That author gives the substance of them in these words:—

[1] 1 Fount. 403.

[2] 1 Fount. 481.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

"As no bankrupt can prejudge his creditors who have done "diligence by preferring one of them to another, so neither "can he make a disposition to any confident person, with "power to him to pay the debt due to himself in the first "place, and his creditors in the next place."[1] Both cases were exactly parallel to that of Lord Preston's creditors. The dispositions were to conjunct and confident persons, with power to assume other creditors; and they were sustained in so far as the disponees themselves were onerous creditors, but set aside in so far as the disponees had exercised a power of assumption, and thereby created preferences.

Some doubts, entertained with regard to the import of Harcarse's report, which is not very distinct, are entirely removed by viewing it in connexion with that of Fountainhall. It is questioned whether the disposition in Murray's case was to all the creditors of the defunct, or to some of them only; and it is said, that if it had been to all of them it is clear that no objection would have been taken to it, and that no discussion could have arisen upon the subject. But it will be remembered that in the case of Murray, which was "a competition, as Harcarse tells us, between the cre-"ditors of the defunct and the creditors of the heir," and not of the creditors inter se, it was of no consequence whether the disposition was to one or to all of the defunct's creditors; for if Murray's plea had been well founded, every disposition granted within the year would have been null, whether to the one or to the other. But it was found that Murray, as a creditor of the son, had no title to insist under the statute at all. Another difficulty is resolved, viz. that the disposition in favour of Arniston was sustained for his own debt, but not in favour of the creditors he had assumed. We have seen that that distinction did not proceed upon the Act 1661, but solely upon the Act 1621. If Arniston's disposition had been sustained upon the Act 1661, which it was not, it must necessarily have been sustained quoad the creditors he had assumed also.

[1] Vol. II. 39.

The result of this inquiry is, that the only judgment on which Erskine founds does not touch the present question at all; and that the other judgments in the cause decide, not indeed in express terms, but by plain and necessary implication, that a disposition in favour of one of the ancestor's creditors within the year is unavailing in a question with his other creditors. In so far, therefore, as precedent goes, Erskine's opinion is not only unsupported, but it evidently proceeds from his mistaking the circumstances of the case.

If we consider the statute itself, it appears to me fully to justify the view taken of it by the Court in Arniston's case. There are two remedies given by the statute. The one is a prohibition on the heir to sell intra annum deliberandi, which is pure and absolute, and the ground and nature of it is well explained by Lord Kames, in reporting the case of Taylor[1]:—"During the annus deliberandi an heir apparent "is protected from diligence, that he may have time for "deliberating whether he will undertake the succession, yea "or not. It is neither just nor expedient that in the mean-"time he should have liberty, by disposing of the predeces-"sor's estate, to withdraw from the creditors the subject of "their payment." The other remedy is the separation of the ancestor's estate from that of the heir, according to the rule of the Roman law, and reserving it for three years to be attached by the ancestor's creditors exclusively. With the second remedy we have no concern here.

With regard to the first, it is just as prejudicial to the body of the ancestor's creditors to allow the heir to dispose of the estate to one of them before the death of the ancestor has come to the knowledge of the rest, as if he had disposed of it to a stranger. It is settled law that, although the heir has no creditors of his own whatever, he cannot sell the estate within the year and spend the price. Such a sale may be challenged by any of the ancestor's creditors, even in a question with the onerous purchaser, on the ground that the heir stands inhibited under the statute; and, on the same principle, the inhibition should be available to all the

[1] 26th Nov. 1747.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

other creditors against one of their number who is preferred. Throughout the whole system of our law, and particularly in reference to the Statutes 1621 and 1696, every deed of the bankrupt bestowing a preference is termed an alienation in prejudice of his creditors, though it is in favour of one of them. Why the same words in the Statute 1661 should receive a different construction I am not aware. But it is unnecessary for me to pursue this argument at greater length, as it is illustrated, in my humble opinion, so fully and so well in Mr. Bell's Commentary on the Statute 1661.[1] It is very natural, I think, that the learned author, in the first three editions of the work, following the dictum of Erskine, should have held a disposition to one of the ancestor's creditors unchallengeable by the rest, and that he should have retracted that opinion when he found that the dictum not only rested upon no authority whatever, but was in opposition to the very case quoted in its support.

With regard to the fourth question, I am inclined to concur in the opinion of Lord Fullerton. Neither the case of Devaynes nor that of Houston is exactly in point, though the principles there laid down, I think, must be attended to, having to a certain extent an application to this case. But, as is remarked by Lord Fullerton, if at any one moment the balance outstanding at the expiration of the guarantee was actually cleared off, it seems extremely difficult to hold that a new balance could be reared up against the cautioner by subsequent transactions.

Lord Mackenzie.—I concur with the opinion of Lord Moncreiff on the first two questions, and also on the 4th. On the 3d question, I now concur with the opinion of Lord Corehouse.

Lord President and *Lord Fullerton.*—Question 1.—"Keeping in view the state of the feudal titles, the evidence "afforded by the company's books and other documents, "and the conduct of the parties generally," we are of

[1] 1 Bell's Comm. 729, et seq.

opinion that the estates of Campse and Lauriston " were " acquired and vested in the person of Thomas Allan as his " own individual property," and that they were not " held " by him in trust or for behoof of the company of Robert " Allan and Son, or subject to their disposition."

The titles forming, in every question of this kind, the most important and, in general, a conclusive element of evidence are clear and unqualified. From these titles, Thomas Allan appears to be the absolute proprietor; and in regard to one of the estates, that of Campse, the deeds by which the transaction was finally concluded bring directly into contrast the character of Thomas Allan as trustee for the company of Robert Allan and Son, and Thomas Allan in his individual character. Upon that occasion the heritable security previously held over the estate by Robert Allan and Son was made over to Thomas Allan, the purchaser of the estate, in order to fortify his title. The security had been held by Thomas Allan, as trustee for the company; and the deed granted on that occasion, signed both by Thomas Allan and Alexander Wight, subscribing by the company firm, bears that Thomas Allan, as surviving trustee for the said company of Robert Allan and Son, disponed and made over the said security to the said Thomas Allan as " pur- " chaser foresaid," the purchase being described in the previous part of the deed to have been made by Thomas Allan as an individual.

It is unquestionable then, that, ex facie of the titles and the records, Thomas Allan as an individual was the absolute proprietor of the lands in question; and indeed his right in that character, and in that character alone, is recognised in those very securities on which the defenders found. From the heritable bond granted to the Royal Bank in March 1832 over the lands of Lauriston, and that granted by his son Robert Allan, on the 29th July 1834, over the estates of Campse and Lauriston, it is clear that in each of those transactions respectively, Thomas Allan and Robert Allan were dealt with, in so far as the heritable securities were concerned, as the absolute proprietors of those estates.

Such being the state of the evidence afforded by the titles

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

and the records, we consider it to be incumbent on the defenders, in order to establish a trust in opposition to that evidence, to make out their case by complete legal proof; and even admitting the competency of a reference to the books of Robert Allan and Son, as being constructively the "writ" of Thomas Allan, in consequence of his partnership, it appears to us that the evidence falls very far short of that standard. The books and the other documents referred to no doubt do contain some entries and passages which, in the balancing of mere probabilities, might seem more easily reconcileable with the notion of a trust in the person of Thomas Allan than that of a right of absolute property. In other particulars the inferences from those entries and documents might tend the other way. But without going into any minute examination of the evidence as if this were an open question of probability, we think it enough to state that in our opinion it is insufficient to take off the effect of that legal attestation of Thomas Allan's right of property which is afforded by the titles.

Question 2.—Holding the opinion expressed in the preceding answer, we might perhaps be dispensed from answering this second question, which, on the supposition of that answer being correct, becomes unnecessary. But, "assuming the said estates, or either of them, to have been "vested in Thomas Allan in trust or for behoof of the com- "pany, or subject to their disposition," we should have great difficulty in holding that the bond and disposition in security of 29th July 1834 was reducible under the Act 1661. Our difficulty does not arise from the supposed effect of a latent trust, in qualifying the rights completed by third parties, and flowing from one who appears to be the absolute proprietor. Indeed, it does not appear to us that the circumstances of this case are such as to raise that question; for here the disposition 1834 is the first completed right flowing from the party who is supposed to have held under the latent trust, and is founded on by the very party who pleads that latent trust. It is in itself necessarily preferable, unless it can be reduced; and the only question is, whether it can be reduced under the Act 1661.

The pursuer maintains the affirmative, on the ground that, in applying this statute, an estate, appearing from the titles to be unqualified in the person of the ancestor, must, even although a trust be proved, be treated precisely in the same way as if it had been his absolute property. Now this is a point on which we entertain very great doubt.

Upon the assumption here made that Thomas Allan held the estates in trust for the company, he was evidently under the obligation to denude when required. On his death the estates, on that assumption, must have been taken up by his son, Robert Allan, under similar obligations to the new company, upon which all the rights of the former company had devolved. Robert Allan then, holding the estates under that obligation, and disponing them in security to the Royal Bank on the requisition of the company, the true proprietors, only did that which he was in law bound to do; and we are rather inclined to think that such an act does not fall under the operation of the statute. It appears to us, that the enactment proceeding on the preamble, that "appearand heirs, and heirs immediately after their predecessor's death, do frequently dispone their estate, in whole "or in part, in prejudice of their predecessor's lawful "creditors, before their death come to their knowledge, or "before they can do lawful diligence against the saids "appearand heirs," contemplated only the voluntary acts of the heir, as distinguished from those which he was under an obligation to perform. In the first place, in construing a statute of this kind, passed for the special purpose of protecting the equitable rights of creditors, we think the term "their estate" can hardly be understood to comprehend estates held by the ancestor or the heir in trust for other parties. But, secondly, looking at the whole tenor of the statute, it rather appears to us that it was intended to supply in some measure the place of lawful diligence by inhibition against "the saids appearand heirs," the only diligence which could be adopted against appearand heirs during the annus deliberandi; and it would seem difficult, agreeably to the obvious spirit of the statute, to extend it beyond the effect of the analagous diligence, of which the

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

operation is confessedly confined to voluntary deeds, i. e. to deeds "granted by a party to which he is not obliged "anterior to the inhibition[1];" a description which clearly could not comprehend a conveyance granted by a trustee in obedience to the requisition of the trustor.

Question 3.—Holding the said estates to have been the private property of Thomas Allan as an individual, we think that the bond of 29th July 1834 is reducible under the Act 1661. The only ground upon which we understand this conclusion to be denied by the defenders is, that the bond was not, in the sense of the statute, granted to the prejudice of the creditors of Thomas Allan, inasmuch as, although not granted directly to any one of those creditors, it was granted at the requisition of Robert Allan and Son, who were large creditors of Thomas Allan, to the Royal Bank, and must have the effect of diminishing, to the amount drawn by the Royal Bank under it, the gross amount of the debt due by Thomas Allan to Robert Allan and Son. In short, although the defenders do not undertake to "show "precisely that the money raised upon this security was "paid by the company to parties who but for such pay- "ment would now be claiming as creditors of Thomas "Allan," they argue, as we understand, that, as Thomas Allan's estate must get credit in accounting with Robert Allan and Son to the amount drawn by the Royal Bank from that estate under the security, the case is exactly the same as if the security had been granted directly to Robert Allan and Son. It is unnecessary to inquire into the soundness of this view, because we cannot adopt that construction of the statute, upon which the relevancy of it must depend. Considering the spirit as well as the letter of the statute, we think that even if the disposition in security had been granted directly by Robert Allan to the company, it would have fallen under the prohibition of the statute, as being a disposition to the prejudice of his predecessor's lawful creditors; for, in our opinion, these expressions embrace all dispositions which prejudiced all or any of the creditors of

[1] Ersk. 2. 11. 11.

the ancestor, and must be held to apply to a deed or disposition, which, like the present, had the effect of benefiting one creditor to the prejudice of all the others. Neither does it appear to us, that in sound construction the effect of these expressions can be affected by the consideration of the other object contemplated by the statute, namely, the protection of the rights of the creditor of the ancestor in competition with those of the heir. This last object was attained by the provision that the creditors of the ancestor should be preferred, if they did diligence against the estate within three years after the ancestor's death. But the enactment now in question is a distinct one, and rests upon the separate preamble applicable to it, "that appearand "heirs do frequently dispone their estates to the prejudice "of their predecessor's lawful creditors, before the death of "the ancestor comes to their knowledge, and before they "can do lawful diligence against the said appearand "heirs."

It is true that in a subsequent part of the statute, fixing the precise endurance of the heir's disqualification to dispone, it is said to be unreasonable that it should last during the same period of three years, within which the creditors of the ancestor had a right to obtain, by diligence, a preference over those of the heir himself; but this does not appear to us to control the express terms in which the disqualifying clause is framed. It is not and cannot be maintained, that the heir's disqualification was limited to conveyances granted to his own creditors. In the first place, on that view, the disqualification would have been unnecessary; because, according to the received construction of the statute, the diligence of the ancestor's creditors used within the three years is, by the force of the special enactment, sufficient of itself to frustrate any disposition granted by the heir within that period to his own creditors; and, secondly, it is also a fixed point in the construction of the statute[1], that the disqualification operates not merely against the creditors of

[1] Taylor v. Lord Braco, Mor. 3128; Magistrates of Ayr v. M'Adam, 14th June 1780, Mor. 3135.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

the heir, but against third parties acquiring from the heir within the year, and that although the ancestor's creditors have not done any diligence within the three years. It would seem to follow, then, that the enactment debarring the heir from disponing, though forming part of a statute containing another enactment giving a preference to the creditors of the heir over those of the ancestor by the use of diligence within three years, and although confined, for the reasons there assigned, to a shorter period than that within which such statutory preference was to last, must be viewed as a substantive and independent enactment, of which the force is to be sought for exclusively in the terms by which it is expressed. But the express terms of the enactment prohibit all dispositions within the year, "to the "prejudice of the creditors of the ancestor," which we must hold to embrace dispositions to the prejudice of all or any one of those creditors. No doubt it did not exclude, nor does it appear from the preamble to have been its intention to exclude, the possibility of preference among those creditors, in so far as that preference could be gained by legal diligence. Its declared and very reasonable object was, to prevent preferences by the voluntary act of the heir in behalf of a favoured creditor, before the others had the means of using diligence to secure their rights; and, accordingly, the effect of it when so construed is not to prevent preference by diligence amongst the creditors of the ancestor, but to secure to them equal facilities of using diligence, independently of any voluntary and partial interference of the heir.

From the preamble, then, as well as the enactment, it is evident, that its effect was to disqualify the heir from doing any voluntary act within the year and day, by which the predecessor's creditors, i.e., as we read it, any one of his creditors, would be prejudiced; and in many supposable cases the opposite construction would lead to those very consequences which it appears from the preamble to have been in the contemplation of the Legislature to prevent. Thus, if one creditor of the ancestor had used inhibition against him, which diligence, of course, fell by his death,

the right of such inhibiting creditor might have been entirely defeated by the voluntary conveyance by the heir to a favoured creditor of the ancestor, before the death of the ancestor had come to the inhibitor's knowledge, and before he could renew his diligence; nay, it might have happened that all the ancestor's creditors but one had used inhibition, and yet it might have been in the power of the heir, immediately on the ancestor's death, to grant a preference to that one creditor who, but for the ancestor's death, would have been excluded by preferable diligence. This was an evil which might very reasonably attract the attention of the Legislature. It appears to us that it was the very evil, or at least one of the evils, which it was the object of the statute, as declared in the preamble, to prevent, and which it did effectually prevent by the special enactment.

We are quite sensible of the weight due to the authority of Mr. Erskine; but it is clear, indeed it is admitted by the defenders, that the decision referred to in the passage, that of Ballenden, March 1685, does not support the proposition there laid down. On the other hand, although the final judgment in the other case of Arniston v. Ballenden[1] does seem to countenance the view of the statute maintained by the pursuers, the report is so imperfect, and the judgment in some respects so difficult to be reconciled with any principle, that we do not think it can be considered as an authority. Holding this question as still open, however, we are of opinion, for the reasons already assigned, that on a sound construction of the statute, a disposition by the heir to one or more creditors of the ancestor, to the exclusion of the others, does fall under its prohibitions.

Question 4.—We think that the bond of 30th March 1832 did not "remain in force as a continuing guarantee "and security over the estate of Lauriston, to cover "advances, or any balance due upon advances, made by the "defenders for the company of Robert Allan and Son, "down to the date of the final sequestration of the com-

[1] 2 Brown's Sup. 92.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

" pany." It was granted in security of advances to be made to the company of Robert Allan and Son, consisting then of the individual partners, Thomas Allan, Robert Allan, and Alexander Wight. Such a security could not cover advances made to a different company, though carrying on business under the same firm. The security, therefore, necessarily fell at the dissolution of the company in whose behalf it was granted; and it appears to us that that dissolution took place on the death of Thomas Allan, on the 12th of September 1833. That event had the same effect in a question of this kind as if Thomas Allan had withdrawn his name from the company and given due intimation; the notoriety of the death of a partner being held sufficient to supply the place of such intimation. Neither do we think that the point is affected by the twelfth article of the notes of agreement, providing that in the event of the death of any partner, the right of the heirs or representatives should be determined by the state of the deceased's account at the first balance after the decease, as attested by the survivors, and excluding the right of the heirs to examine the books of the company. This very article seems quite conclusive against the supposition of the continuance of the company in the person of the heirs or representatives of Thomas Allan, particularly in a question of this kind, in which the continuance of the security is held to depend on the continuance of that control to be exercised by the different individual partners, in reliance on whose discretion it is presumed to have been made. We do not think, therefore, that, consistently with the strict interpretation of all obligations of this kind, the defenders were entitled to make advances on the security subsequently to the death of Thomas Allan. But really this point is of very little importance, considering the admissions made by the defenders, in reference to the matters falling under the concluding part of this question.

The remaining part of the question, " whether the " balance, if any, that may have been due when the said " bond ceased so to operate as aforesaid, was paid, or " wholly or partially extinguished subsequently," does not

seem to present much difficulty. For it is very fairly admitted, not only that at the date of the second bond "the whole of the defender's advances to the company "were satisfied and paid, with the exception of about 400*l.*, "but that between the date of Mr. Allan's death and the "date of the second bond, periods might even be pitched "upon when, in consequence of the sums paid in by the "company, and standing at their credit, there was no "balance whatever due."

In these circumstances, there is no necessity to resort to the full extent of the rule adopted in the case of Devaynes; for whatever difficulty there might be in holding the subsequent successive payments to be applicable to the reduction of the balance as it stood at the date of the termination of the guarantee, while the gross balance of the account, viewed as a continuous account, and taken at any one period, remained undiminished, it seems to us clear that, if at any one moment the balance outstanding at the expiration of the guarantee was actually cleared off, a new balance could never be reared up against the cautioner by subsequent transactions.

In regard to this point, the case is much less favourable to the defenders than that of Houston v. Speirs[1], which, in all its essential particulars, nearly resembles the present. There, as here, a question occurred regarding a claim for advances made on a current account against the cautioners; a change having taken place in the modes of drawing, which was held to extinguish the guarantee from the particular date of that change. The Court of Session there took what appears to be a very equitable view, and held that the cautioners were not entitled to derive benefit from the subsequent remittances made to the credit side of the account, except in so far as those remittances, when compared at any one period of the account with the drafts, had the effect of reducing the balance below the amount for which the cautioners were bound at the date of the expiration of the guarantee. It is evident that the principle of

[1] 3 W. & S. App. 392.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

this judgment would, in consequence of the above-quoted admissions, be quite sufficient to support the case of the pursuer. But the cautioners appealed against this judgment of the Court, and the result was a reversal,—a judgment giving full effect to the principle of the decision in the case of Devaynes. At least this seems to us the fair inference from the judgment, which is our only source of information on the subject, as the report contains no statement of the special grounds on which it was pronounced.

And we may add, that we see no room for distinguishing between that case and the present. It is true that the circumstance which, in the present case, extinguished the operation of the security from a particular period of the account, was the dissolution of the old company of Robert Allan and Son, by the death of one of the partners. But that did not necessarily break the continuity of the account, unless the parties chose to close it; for though the former balance had been contracted by the old company, yet as the new company confessedly adopted all their rights and responsibilities, the balance just became as much the debt of the new company as if it had been originally contracted by them; and the effect of their subsequent dealings on that balance must depend on the very same principle. The defenders might have closed the old account, and probably would have done so, had they foreseen the actual result. But as they did not close it, and as payments were made by the new company to their credit in that continued account, the effect of those subsequent payments, in regard to the former balance, as at a particular date, was not a matter within the discretion of the defenders, but is exclusively determinable by the legal principles applicable to the case. If these principles had admitted of any equitable modification, and if it had been held competent, after the event, to split the account into two portions, at the date of a particular balance, from a consideration of what the party would in all probability have done had he contemplated the result, there could not be stronger grounds for applying that equitable modification than in the case of Houston v. Speirs.

There the guarantee had been granted to the house of

Fraser and Company, for drafts to be drawn on them by H. and R. Baird, and to be replaced by remittances from time to time. Transactions took place on this footing till the close of the year 1809, when the balance unquestionably covered by the guarantee stood at about 7,000*l.* In the end of December 1809, Fraser and Company changed their firm to Fraser, Houston, and Company, the partners remaining the same. They intimated this to H. and R. Baird, at the same time desiring them to draw not directly on the new firm, but on a banking house in which they were partners, "Value in account with Fraser, Houston, and Company." Under this new arrangement the subsequent drafts were drawn, and the remittances were made to Fraser, Houston, and Company; they, however, continuing the account as one current account, which was not closed till the bankruptcy of H. and R. Baird in 1811, at which time there was a balance against them of 5,739*l.* For this balance the action was brought, Fraser, Houston, and Company against the guarantees. By the first judgment in the cause, the Court[1] found that the drafts drawn subsequently to the 1st January 1810 were not covered by the guarantee, in consequence of the change of the mode of drawing. But then arose the very question which arises here; viz. how the balance as it stood at the end of the year 1809, which the guarantee undoubtedly covered, was affected by the subsequent remittances to the credit side of the current account. If the account had admitted of being separated at the date of the balance, the case of the pursuers would have been clear. The equitable considerations supporting that view were strong, so strong as to force themselves on the attention of the accountant, to whom a reference on this point of the case had been made. "It is with deference that the accountant submits his opinion, that as the Court have found that "the defenders are not liable for Mr. Logan's drafts on the "banking house, because they were not made in terms of "the guarantee, they are not entitled to derive benefit from "remittances made to a different firm from that to which

[1] 4th March 1820.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

"this letter of guarantee is addressed; and but for which "remittances, it is not probable the new firm would have "authorized the banking house to accept Mr. Logan's "drafts." [1]

These considerations were disregarded, however, both by the Court of Session and the House of Lords, who, although differing in one point, viz. the precise mode in which the subsequent remittances affected the balances at the end of the year 1809, concurred in treating the account as one current and continuous account; being the form of dealing adopted by the parties at the time, without any regard to the mere probability that one of the parties would have closed the account at a particular date, if he had attended to all the consequences of keeping it open.

It does appear to us, then, that the case of Houston v. Spiers, following on that of Devaynes, in the first place, establishes, that in the case of a current account it is not competent for a party to select a particular balance at a particular date, as distinct and not affected by the subsequent operations; and, secondly, determines the effect of those subsequent operations on any balance of a particular date, on principles which are conclusive against the defenders on this branch of the cause.

Lord Cockburn.—I have already given my opinion on this case, and I adhere to it; and have only to add, that on the special questions that have been put, I agree with and adopt the preceding answers.

The investigation and discussion that have taken place since the case was before me as Lord Ordinary have satisfied me the more, not only of the shock that would be given to the law by admitting such evidence as we have here to control the formal and unequivocal titles, but that, even though admitted, this evidence is insufficient for this purpose. Taking the titles and the other evidence together, I think it proved that both Lauriston and Campse were the property of Thomas Allan personally.

---

[1] 3 W. & S. 398.

On the important question, Whether, assuming this to be the case, the bond of 29th July 1834 be reducible under the Act 1661? I cannot, except in the fact that there is a division of opinion upon it in the Court, discover ground even for a doubt. I think that it is reducible; and that the circumstance of the security having been in effect granted indirectly to one creditor of the ancestor does not take the transaction beyond the operation of the statute. If it did, it would follow that a son, who happened to be a creditor of his father, might lawfully defeat the Act, and disappoint all the deceased's other creditors, provided only that he took the estate to himself. It would also follow, that though the statute prohibits all deeds by which the creditors of the ancestor may be prejudiced, the rest are to be held as not prejudiced by a conveyance which withdraws the estate from them and gives it to a single one of their number. Whatever the occasion of the Act was, or whatever evil may have at first directed the attention of the Legislature to this general subject, both the enacting words and the obvious spirit of the statute seem to me to strike at every such transaction. There are, no doubt, some casual indications of an opposite opinion, but certainly nothing which fixes the point. And reviewing the question as quite open, it appears to me, now that we are called upon for the first time directly to declare the meaning of the statute, that both its obvious policy, and the plain rules of construction, require us to put down an interpretation which amounts to a practical abrogation of the act.

Lord Cuninghame. — Question 1.— It is with great hesitation and reluctance, that I find myself constrained to differ from the other consulted Judges, on the first question put to us in the present case. But I am unable to explain and reconcile the continuous entries in the books of the company from 1824 till Mr. Allan's death, relative to the estates of Lauriston and Campse, with any other supposition than that it was intended and agreed between the partners, inter se, that these estates be held by Mr. Allan (at least in the

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

first instance, and till some ulterior arrangement was made) as company property.

No doubt the estates were purchased apparently in Mr. Allan's name; he alone appeared before the world as proprietor, and exercised all the rights and did all the duties of ownership in the counties in which they were situated, during the years that he survived the purchases.

But these or similar circumstances have been often found combined in other cases, where real estates vested in individual partners have been claimed as partnership property. In adjusting the affairs of partnerships and their creditors, the most difficult duty imposed on Courts has been to determine the true character and ownership of property, notwithstanding the terms of the former title, and the ostensible acts of the individual in whose name it is vested. In some instances, the title so procured has been taken by single partners in their own name, from views of fraud towards their copartners—sometimes from motives of conveniency—and sometimes from a desire to conceal from the world the fact that any part of the proper copartnery funds are so invested and withdrawn from the copartnery stock. Hence various cases have arisen (generally after the death of the nominal proprietor) as to the true character and purpose of the title vested in the individual. The cases tried in Scotland have generally arisen between heir and executor; as in the case of Sime and Balfour, Fac. Col. 1st March 1804; Murray against Murray, 5th February 1805, and other cases. In the case of Sime, which was carried to appeal, and remitted back to this Court, 22d July 1811, there seems to have been much discussion as to the effect of entries in copartnership books to qualify title taken in an individual partner's name; and perhaps their pleadings, both in the House of Lords, and latterly in this Court, deserve attention. There have been other cases, also, of the same nature tried, which do not seem to have entered our printed reports.

In like manner questions of this class seem occasionally to have given rise to much discussion in courts of equity in

England, as exemplified in the cases of Foster v. Hall, 3 Vesey, 895, and Smith v. Smith, 5 Vesey, 189, and other cases; and, generally, it is laid down by Mr. Montague, in his Treatise on Copartnership, vol. i. p. 101. "If the partnership property is invested in real estates, the property is "not separated, because the conveyance is made only to "one partner."

In the present instance there is no allegation of fraud, and not even a surmise of any such charge, against the deceased Mr. Allan, for having the title to these estates made up in his own name; but nevertheless the evidence appears to me quite insuperable, to show that these estates were held by him in trust for the company, and that they were in all arrangements and accountings between the partners understood and treated as partnership property.

1st. It is proved irrefragably by the books of the company, that the estates were purchased by the company funds.

2d. Separate accounts were opened in the books of the company for each of the estates, the price and expenditure were charged in accounts kept specially under the heads of "Estate of Lauriston" and "Estate of Campse;" which accounts, as increased by periodical expenditure, were carried each year into the annual balance sheets of the company, as part of their assets or stock.

3d. The purchase of one of these estates (Campse) was made by Mr. Allan for behoof of the company, in consequence of a prior heritable security or mortgage which the company held over the property; and as the price at which the estate was exposed was considerably less than the amount of the company's debt, it was a matter of prudence for the company to make the purchase to save further loss.

4th. While the price of and the expenditure upon these estates were thus treated as part of the company's stock, there were other accounts in the ledger, embracing private charges and expenditure connected with Mr. Allan's family and domestic establishment; and these were not carried to the balance sheet as stock, but to Mr. Allan's private account.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

Finally, even if the preceding circumstances were in any respect ambiguous, the clause in the articles of agreement, subscribed in 1831 by Mr. Thomas Allan and Mr. Wight, then the only partners of Robert Allan and Son, when they assumed Mr. Robert Allan junior as partner of the banking house, appears to me to be decisive of this inquiry. By that clause it was declared, "8th, that Lauriston be taken "as Thomas Allan's own speculation, he paying the price, "3 per cent. interest on the cost, and on what is or may be "laid out on the said property." This was an agreement subscribed only in 1831, seven years after the purchase. But why this stipulation if Lauriston was ab initio the private property of Thomas Allan, as the title and his ostensible acts of ownership indicated? In that point of view the preceding clause would have been unnecessary and preposterous.

In opposition to the entries in the books here referred to, there is hardly one counterbalancing circumstance to be gathered from the books. No doubt it has been stated, that in the accounts entered in the company's ledger at to Lauriston, Mr. Allan was charged with no rent for the occupation of the house. But this seems to me to be an immaterial circumstance, as the rent may either have been overlooked or reserved for a final arrangement; or possibly the parties may have agreed between themselves that Mr. Allan should have the temporary possession of the house without rent, in consideration of the great extra trouble that he must have had in managing the estate as the ostensible proprietor.

The whole chain of the evidence has impressed me with a conviction quite irresistible, that the two partners of Robert Allan and Son privately understood each other as to these estates, and secretly arranged that the properties should be held for behoof of the company, although undoubtedly they seem to have had reasons of their own for not declaring this openly to the world.

The report of the accountant also has confirmed me in this conclusion. He states very distinctly in this report, that, "with regard to Campse, the whole tenor of the entries in "the company's books is inconsistent with the supposition "that it was the individual property of Thomas Allan;"

and with regard to Lauriston, he adds, "The title 'Estate "of Lauriston,' under which the transactions in relation "thereto were entered in the company's books, and under "which the balance due thereon was included among the "assets of the company in their annual balance sheets, "would likewise indicate that the estate was the property of "the company." He, no doubt, adds, that "if it be com- "petent to control or explain the meaning of that title by "a reference to other documents, then it does not appear "that the entries made in this account would in other re- "spects be inconsistent with the supposition that the estate "was the individual property of Thomas Allan."

Now, it humbly appears to me that there is great fallacy in this latter remark; though, in fact, the whole case of the pursuers, on the first and fundamental point of the case, turns on it. It is argued, that when the title and external acts of Thomas Allan, and the entries in the books, are at variance with and opposed to each other, a preference in point of evidence should be given to the title. But this appears to me to be clearly contrary to the principles which ought to regulate such a case. It is thought that the evidence of the books, the private and confidential records of the partners, and of their real arrangements with each other, ought far to outweigh the formal title and ostensible acts of the individual partner. There were many reasons which might induce the partners to allow Mr. Allan to act as the apparent owner of these estates, when they belonged to the company of which he was the principal partner; but there was no probable or intelligible reason for opening accounts in the company's books as to these properties, and thereafter including them each year in the balance sheets as part of the stock, if they were not partnership property. Even a single document or entry in such books, if explicit, is sufficient to qualify the title; far more the series of entries for a tract of years, which here occur.

It is a matter of notoriety that the books of a merchant, and entries therein known to him, have ever been viewed in Scotland as equivalent to his writ, and as such they may be received to control a title vested in his person, and to prove

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

a latent trust in terms of the Act 1696, cap. 24. Accordingly, such evidence is every day received to support bills, which have undergone statutory prescription; and it is apprehended that this must form evidence equally competent in the present case.

With regard to the object of the parties in vesting these estates in Mr. Allan's name alone, as both the partners had died before the present discussion arose, it is very difficult now to ascertain all the reasons and views which influenced the parties in their arrangement. At the same time some of these may probably be gathered from the nature of the company's business and their position in trade. Such investments of company property by merchants and bankers have notoriously been very common during the last twenty years, when it has been difficult to find other modes of employing capital safely and profitably; and though it is probably correctly stated in the paper of the pursuers, that some bankers of eminence and in high credit, in similar cases, have been in use to take the titles to one of their own (number), the partners formally and explicitly setting forth on the face of the parchments that the properties were held for behoof of the company; yet this, it is believed, is not an invariable usage, and it is obvious, that it might not be so prudent for a small banking establishment like Messrs. Allan and Son so to take the title. It might not have improved the credit of such a bank to have had it openly proclaimed, that the property of or deposits with the company were invested to a great extent in land, not capable in emergencies of immediate liquidation.

I am not aware that there is any peculiarity in the law of heritable property in Scotland, founded either on our system of registration, or on any other principle, which is adverse to the trust supposed to have been constituted in the present case. The law of heritable property is not like the statutory law of shipping, which, on well known grounds of policy, renders any trust for behoof of parties not named in the register null and void. The system of registration of land rights is chiefly for the protection of purchasers, or of those who obtain real securities from the ostensible owners.

These, from the faith due to the records, must always be safe, when there is an unlimited title in the disponer's person on the record. But to other effects it is indisputable that trusts of land held by individuals for behoof of others, or for specific purposes not appearing on record, are every day sustained, without regard to the claims of personal creditors, if the parties beneficially interested in the estate get a conveyance to or security over it before other creditors do diligence against the estate.

If indeed it were alleged in an action that any class of personal creditors gave credit to a party on the faith of his having certain estates of which he was ostensible proprietor, that they made advances to him on that footing, and that the property was afterwards fraudulently represented as not belonging to him, when it was truly his all along, the law would give redress against this fraud, as exemplified in the old case of Strutt (Mor. Dict. p. 4911), and in the late case of Dougal (11 Shaw, 1028). But it is unnecessary to observe that no such case is raised here. The pursuers do not allege that they gave credit to Mr. Allan on the faith of his estates, it is not said that their money was applied to the estates, nor is it alleged that the company concealed their investment from any fraudulent views towards the pursuers. According to my view the only parties really misled were the creditors of the company.

In giving effect, therefore, to the trust in the present instance, as declared in the company's books, no party is entitled to raise any plea of hardship. On the contrary, if the bond now under challenge had not been granted, the creditors of the company would have had good ground to complain, that the title held by Mr. Allan, as an individual, was truly made up to their prejudice, and in defraud of their rights. Justice, however, was in some measure done to them by the security granted for behoof of the company now under reduction; and when this large bond was granted for behoof of the company, and when the personal creditors allowed that bond to remain unchallenged for ten months after it was granted, and down to the sequestration of the the company, it is in vain to say that they were deceived by

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Consulted Judges.

the records, or were led by Mr. Allan's title to rely in any respect on these estates, in the credit which they gave to him.

It may possibly occur, however, that at least after the articles signed in 1831, when it was agreed that Lauriston should be held as the "speculation" (private property) of Mr. Thomas Allan, this estate at least should thereafter be considered as his private property. And unquestionably, if he had been able to pay up his large balance to the company, he was entitled to have it taken out of the company's stock. But as he never was in a condition to do so, that estate (as well as Campse) was properly continued in the balance sheets after 1831, apparently till he could repay the advances. As he never could do so, but on the contrary, as Mr. Thomas Allan died very largely indebted to the company, the estate of Lauriston as well as Campse, in my opinion, continued part of the company's stock down to the date of sequestration.

Questions 2, 3, 4. — On the other questions I concur entirely with the answers of Lord Moncreiff.

Judgment of Court, 17th May 1839.

Thereafter the Second Division, upon advising these opinions, pronounced the following interlocutor: — "17th May 1839. — The Lords having resumed consideration of the reclaiming note for the defenders, report of Donald Lindsay, and mutual revised cases, with the opinions of the consulted Judges, and heard counsel for the parties, refuse the desire of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary submitted to review, of new find expenses, and also additional expenses due, subject to modification; allow an account thereafter to be given in, and remit the same, when lodged, to the auditor to tax and report."

Their Lordships delivered the following opinions at the final advising: —

Lord Justice Clerk.—Having considered the new cases that were ordered for the purpose of obtaining the opinions of the other Judges, and having had the advantage of the opinions of their Lordships, we are now called upon to state our views of this case. I formerly stated, on the 6th of June 1837, the impression which the report of Mr. Lindsay, with the cases then before us, had made on my mind, as to the substance of the first query submitted afterwards by this Division; but, upon deliberate consideration, and again attending to that report, and the evidence resulting from the books and correspondence of the parties, with the state of the titles of the estates of Campse and Lauriston, I have now come to be of opinion, with the large majority of the Judges, that both of these estates must be held as the private property of Mr. Thomas Allan, and that the distinction contemplated by the accountant, and which at first I was disposed to adopt, between the situation of the two estates, is not sufficiently established.

I am free, however, to admit, that from the original connexion of the company of Robert Allan and Son with the estate of Campse, in having lent away money on the security of it, and the different steps taken with regard to it previous to the disposition being executed in favour of Mr. Thomas Allan, and his acts as proprietor, down to the period of his death, along with the state of the company's books, there may be greater room to doubt than in regard to the estate of Lauriston; but still there does not appear to me to be full and sufficient evidence that the estate of Campse was held by Thomas Allan only in trust for the company, although there is no doubt that he was liable to the company for the cost and expenses attending his purchase of that property, as well as of the estate of Lauriston. With the latter property the company had originally no connexion whatever; the steps as to the purchase of it—the improvements upon it—the use and enjoyment of it—having been entirely participated in by Mr. Thomas Allan alone. The fact of his being the head of the banking house, and the holder at one time of three

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

fourths, and afterwards of one half of its whole stock and property, gave him that preponderating influence that enabled him to command the most extensive loans of its funds, for the security of the company, in regard to which it held only the amount of the credit of his private account. These loans Thomas Allan applied in the acquisition of the two estates of Campse and Lauriston, which there is undoubted evidence he all along used as his exclusive property; and as there is nothing amounting to any acknowledgment on his part, or even a statement on the part of his copartners, or of the company, that though the titles clearly bore the estates to be Thomas Allan's individual property, they were in reality held only by him in trust for the company, it appears to me quite impossible to resist the conclusion, that these estates must be held to have been the private property of Thomas Allan.

In the Appendix of the Report as to Campse, there are letters from Mr. Wight, the then only partner of Mr. Allan, in writing, which he had the fairest opportunity, if the fact had been that that property in reality belonged to the company, of indicating his concern in it. But he there writes in a style clearly indicating that the property was exclusively that of Mr. Thomas Allan, and as to which he could do nothing in his absence.

Query 2.—If the opinion is well founded, that the two estates of Campse and Lauriston were the exclusive property of Thomas Allan, it is hardly necessary to enter upon the question put upon the hypothesis that they were both or either held in trust by him, and, if so, whether a conveyance of them by Thomas Allan was a contravention of the Act 1661. But my opinion in regard to that question will be better understood by adverting first to the point embraced in the third query.

Query 3.—I agree in holding this to be an important question, and certainly far from being unattended with difficulty, especially after the division of opinions among the consulted Judges. But I remain, after the fullest consideration, of the opinion I originally formed, and which

coincides with that delivered by Lord Corehouse on this point, and with all deference to those opinions of an opposite nature that are now before us.

I agree entirely as to its being our duty to take the whole of the Act 1661 into view, to attend to its preamble, and to observe particularly its enacting words; and when I do so, I feel myself exactly in the situation of Lord Corehouse, as to what was the true intendment of that Act; and as he has in the clearest manner demonstrated, from comparing the reports of Harcarse and Fountainhall, which I have also carefully looked into, that the decision referred to by Mr. Erskine as the foundation of his opinion gives no authority for it, while the argument maintained as to the true meaning of the Act is not resisted, I must concur entirely in the conclusion to which Lord Corehouse arrived, that the Act 1661 does apply to a disposition granted by an apparent heir within the year after his ancestor's death, which, as preferring one or more creditors of the defunct to the rest, is undoubtedly to their prejudice, and consequently is expressly prohibited by that Statute.

On the supposition that both or either of the estates of Campse and Lauriston should be considered as held in trust by Thomas Allan for behoof of Robert Allan and Son, as he undoubtedly had right to one half as a partner, I must be of opinion, from the view I entertain of the operation of the Act 1661, that the disposition by his son and apparent heir within a year after his death, of the interest that his father held in favour of the defenders, creditors of the defunct, was invalid under that Statute. Whatever beneficial interest Thomas Allan held in those estates was taken up by his son Robert Allan, and his act of disponing or giving away that interest to the prejudice of any one creditor of his father, within the period of a year from his death, appears manifestly to me to be what is declared invalid by the Act 1661.

Query 4.—In reference to this query I am of opinion, that the company of Robert Allan and Son was dissolved by his death, according to the established rule of law, and that there is nothing in the article in the new agreement of copartnery, which was merely to regulate how the interests of

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

the partners inter se were to be adjusted, that can affect the application of that rule. No notification of the dissolution so occasioned by Thomas Allan's death was requisite, but at any rate it seems impossible for the defenders to be listened to in stating want of notification, seeing the way in which they transacted with his son in reference to his death, and the new security obtained by them for a continuation of the credit formerly allowed.

The question then remains, whether the principle established by the decision in the case of Devaynes, and subsequently followed out in that of Houston's Executors v. Speirs and others, applies to the state of accounts between Robert Allan and Son and the defenders. It appears to me that by the death of Thomas Allan and the consequent dissolution of the company, the security granted by him could no longer be available to the defenders, as being strictly applicable only to a credit for the benefit of a company, of which Thomas Allan was a partner. If, then, the account kept by the defenders, and still allowed by the defenders to be operated upon by Robert Allan and Son after Thomas Allan's death, is to be held as a continuous account, and no pause in it or resting place is stated to have occurred, it seems difficult to deny the application of the principle of the case of Devaynes, that if the balance existing at the time of Thomas Allan's death was afterwards wholly or nearly extinguished, by payments made previous to the grant of the new security, which is fully admitted in fact by the defenders, that balance cannot be again reared up as being covered by the security granted by Thomas Allan, in consequence of posterior advances made on the drafts of the company of Robert Allan and Son.

If the circumstance of the account in this case not being a deposit one, as that in Devaynes' case was, and that the defenders are creditors and not debtors, is to be held as rendering the cases essentially different, as assumed in the opinions of Lord Moncreiff and others, the effect of the decision in Devaynes' case may be got rid of; but I feel myself more disposed to concur in the view that is taken in the opinion subscribed by the Lord President and Lord Ful-

lerton, particularly when the decision of the House of Lords in the case of Speirs v. Houston's Executors, as reported in Wilson and Shaw, vol. iii. p. 393, is attended to.

6th April 1841.

Opinions of Court.

Lord Meadowbank.—Question 1.—The opinion I originally gave, respecting the estates of Lauriston and Campse, I adhere to. Both, I think, must be held to have been the property of Thomas Allan.

Question 2.—I am of opinion that the Statute 1661 never could be applied to a deed by the heir, by which he bonâ fide gave implement of a special trust standing in the person of his ancestor. Upon these points I concur with Lord Moncreiff, and have nothing to add.

On the 3d question I was originally of the opinion given by Lord Moncreiff; but, after full consideration of the opinion of Lord Corehouse, I have altered my view of the case, and I am now obliged to say that I think the heir, without contravening the provisions of the Act 1661, cannot dispone, even within the year, any part of the ancestor's estate to a creditor of that ancestor. This view is chiefly based on the (to me satisfactory) explanation Lord Corehouse has given of the only decision on which Erskine founds an opposite opinion, and of the satisfactory evidence his Lordship has given, that the import of the other decisions referred to lead directly to a result altogether the reverse.

Upon the 4th question, I am inclined to concur with the Lord President, Lord Fullerton, and Lord Corehouse.

Lord Medwyn.—Adam Christie and others, creditors of Thomas Allan, have raised a reduction against the Royal Bank, for setting aside the heritable bond and bond of corroboration and disposition in security, granted 29th July 1834, as being reducible under the Act 1661; and for having it declared, that the sums advanced by the Bank under the former bond of 30th March 1832, of which this was a corroboration, had been all paid up prior to the granting of the said bond.

The main question is, whether Thomas Allan was abso-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

lute proprietor of Campse and Lauriston, or if he held these estates as trustee for the company of Robert Allan and Son.

Before adverting to this matter I may observe, that at one period in this cause much learning was brought forward in support of the plea, that the statutory adjudication in favour of the trustee completes the real right of Thomas Allan's creditors, and vests it in him for their behoof, unaffected by the latent trust in his person, assuming that there is such a trust. There cannot be any question, that the case of Duncan v. Wylie fixes the law wherever the competition is between the creditors of the ex facie proprietor and the trustor, or person for whom he is trustee; the real right secured by the adjudication must prevail over the latent personal right pleaded against it. The creditors have the records shewing their debtor to be proprietor, and this right cannot be defeated by any latent personal back bond. But that is not the case here; the competition is between a public exercise of this latent trust (if there be a trust) made real by infeftment, and the subsequent adjudication of the subject; and the question is, whether this latter real right will invalidate the prior real right. If these creditors, personal till the adjudication of the statutory trustee, trusted to the records, these same records also showed the bond by the trustee as an exercise of the trust in his person. About this there really seems no doubt, notwithstanding the very elaborate argument we have in some of the papers.

Now, then, was Thomas Allan a trustee for the company, as to both or either of Campse and Lauriston, when the titles in both instances were in his name individually?

Notwithstanding the nearly unanimous opinion of our brethren, I cannot say I think it so easy to arrive at the conclusion that he was proprietor of both as they have done.

It is always treated as if this were the ordinary case of one appearing, ex facie of the titles, proprietor of an estate, and that a third party maintains that he holds it as trustee for him. Very pregnant proof, and by writ or oath of the alleged trustee, would be required in such a case. The claim is ex facie improbable, and statute requires that species of evidence to get the better of it; for no one would allow

his estate to stand in the name of another person, without securing evidence of the trust by a regular back bond or letter. But it must be considered here who is the apparent proprietor, and for whom he is said to be trustee, and why it is held in that way.

1. It is law in this country that a company cannot hold heritable property, and that such can only be held by a trustee for them.

2. That here the alleged trustee is the senior partner of the company of Robert Allan and Son, from whom a regular back bond was not likely to be taken, when the books of the company, unquestionably equivalent to his writ, can supply evidence of the trust.

3. The only act of ownership by Thomas Allan, beyond mere management of the property, was an exercise of the trust for the benefit of the company; for these two bonds were for behoof of the company, and the only instances in which money was raised upon it.

Now, keeping these things in view (so that this is in fact a transaction inter socios), let us consider the import of the evidence we have indicative of the true character in which Thomas Allan held these estates.

1. Of Campse, for they require separate discussion, and I think the differences between the two have not been sufficiently attended to by our brethren:—

Robert Allan and Son having granted a cash credit to David Betson, with two cautioners, for 8,000*l*., and a security over Campse, Betson was sequestrated September 1814.

Campse was sold and purchased in name of Thomas Allan for 7,000*l*. This purchase was made by desire and for behoof of the cautioners Anderson and Wilkins, who, however, were unable to discharge the claim under the bond, notwithstanding repeated calls upon them by Robert Allan and Son, and complaints for the inconvenience occasioned to them.

On 1st March 1820 (no title having yet been taken from the trustee), they intimate to Anderson and Wilkins that they "had determined to take Campse to themselves, at the "price it was purchased by Mr. Walker, in order to keep

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

"ourselves free from risk;" and add, "we beg you may "distinctly understand that we have no wish or intention of "keeping the estate, but will make it over to you as soon as "you are in a situation to complete the purchase." And accordingly, on 7th March, evidently in fulfilment of the intention expressed in this letter, as the company could not hold it in their own name, but must do so by a trustee, Thomas Allan desires it to be made out in his name.

On 20th March 1820, they again write, "We beg to "assure Mr. Anderson we have no wish whatever to possess "Campse;" so still it is the company, and not Mr. Allan individually, that is to possess this property.

A disposition is granted in favour of Thomas Allan; and to show distinctly that this was not from any change of intention as to the proprietorship, but that the purchase was taken for the company, they thus write, 13th February 1821, to Anderson and Wilkins: "We can have no objection to "credit your account for 7,000*l.* of the date we resolved to "retain the Campse estate, viz. 1st March last year."

While it was yet uncertain whether Anderson and Wilkins would complete the purchase, the account is kept in the books under Betson's and their names, credited with sums paid by them, and with the rents of the estate; and, on the other side, with any expenses and interest. It is closed on 11th November 1823, when all hope of their being the purchasers is abandoned, and 8,909*l.* 10*s.* is the balance of the account; and of that date an account is opened "Estate of "Campse near Dunfermline," of which the above is the first entry, with this addition, "being the real cost of Campse at "this date." Now nothing can more distinctly mark that this was still a purchase of the company. To whom was it the real cost? Not to Thomas Allan if he was the purchaser, for the purchase money was just 7,000*l.* But if the company were the acquirers, then this was the sum it cost them; and it was right in them to commence the account as against the estate of Campse with this sum, to show, when they disposed of it, as their whole correspondence shows they meant to do, they might ascertain their ultimate loss. If they could have sold it for 8,000*l.* the loss would have

been about 1,000*l.*; if they got 9,000*l.* for it, it would have been less, perhaps nothing. But if Thomas Allan had been the purchaser, and even although he wished to keep up a separate account for Campse, and although it would have been more regular to have opened it as Thomas Allan for Campse, I lay no stress on its being otherwise, except that this was the regular way of entering it, if it was the purchase of the company with the view of selling again.

The old account would have been closed by making him pay the price, and then the excess should have been entered as a bad debt against the company; and it is distinctly stated that at that time he had more than credit for that sum in his account with the bank, so that it might and would have been set against this credit if it was truly his purchase. But even if he did not wish to draw upon his private account for the price, but wished the company to advance this sum for him, as it is plain, on this supposition, that whether he gained or lost by a resale of this estate, the loss or the profit, as it fell short of 7,000*l.* or exceeded it, would accrue to himself individually, and not to the company; and, on the other hand, as he individually was not to suffer the loss, in so far as the real cost exceeded the sum he undertook to pay for it, in this view also the account should have been closed quite differently. For the price Thomas Allan should have been debited, and the difference was just loss for ever to the company, in the same way as if any third party had been purchaser; and then the account for the estate of Campse should have commenced with the price advanced by the company to Thomas Allan, and by keeping the subsequent portion of the account in the books, would show the actual cost to Thomas Allan as the purchaser. That this has not been done is the most satisfactory proof that he was not purchaser and proprietor, but only trustee for the company.

Since the feudal title was in Thomas Allan's name, it was necessary that any lease to be granted or rent to be received should be in his name; and as the senior partner of the house, and the person most interested, it was quite natural that he should also correspond with the factor in his individual name; but if he was the purchaser, and the firm had

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

no concern with it, it is quite inconceivable that Robert Allan and Son should take any concern or management of this estate. They were bankers, and not land-agents; yet they correspond about a sale of the property (Nos. 18 and 19, Feb. 1822), also about a new lease (Nos. 19, 20, 21, and 22, March 1822). They admit payment for miscropping (No. 31, August 1823), and Mr. Wight gave instructions and acted as proprietor (Nos. 17 and 26, February 1822). This can only be accounted for on the idea that the estate was the property of the company, thus corresponding entirely with the entries in their books, which, as stated by the accountant, lead to the conclusion that it was company property.

For this account of Campse is continued till the failure of the company, charged on one side with sums laid out and interest, and credited with rents received; so that on 1st January 1834, after Thomas Allan's death, it is still so stated, and amounts now to 10,216*l.* 11*s.* 11*d.* Even then, although there are sums due to Thomas Allan on two accounts, they are not set off against the other, but the estate of Campse still is entered as debtor to stock, as part of the assets of the company.

It is mentioned as a very important feature in the case, that when the titles to Campse are made out, they bring directly into contrast the character of Thomas Allan as trustee for the company, and Thomas Allan in his individual character; for the security previously held over the lands by Thomas Allan as trustee for the company is made over to Thomas Allan "as purchaser foresaid," in confirmation of his title. Now this to me is one of the strongest points in the case in favour of the view I take. If Thomas Allan was purchaser of Campse on his own account, what earthly occasion was there for him to confirm his title from the trustee by an assignation to the security of the heritable creditor. He was the heritable creditor himself. He was the surviving partner of the company in whose favour it was granted; he was the senior of the two partners of the new company. What injury could he suffer if he had not acquired right to this bond in

fortification of his title? It is plain he did not require this, and got no confirmation of his title by it. But if the company were compelled to take this estate to themselves, because Anderson and Wilkins could not pay their debt, and their object was of course to dispose of it when they could do so to advantage — and it was necessary to have the titles made out in name of a trustee,—it was fit that the title should be complete in him, such as a purchaser would require, and that all the usual security of a sale under such circumstances should be ready to be afforded to a purchaser. The assignation is made out at the same time with the title by the trustee, and, no doubt, just under the idea of the company disposing of the lands as soon as possible, in which case alone it could be of any use. And we see accordingly, that in 1822 the company corresponded about a sale, as of their own property. If the sale had then taken place, the title was completed in all respects, in the person of their trustee, to suit the most scrupulous purchaser. This strongly confirms my view of Campse being company property.

Another circumstance leading to the same conclusion arises out of the new arrangement in 1831, when Robert Allan was assumed as a partner. In the articles of agreement then drawn up for settling the interests between the new and the former concern, the 4th article provides, "That "previous to 1st January 1832, such debts as are wholly "desperate be written off, and the stocks and doubtful "accounts be taken at a reasonable yet full valuation into "the new books." Now by this time it was perfectly ascertained that Anderson and Wilkins were to pay no more; there was nothing for the balance due except the estate. Hence, if Thomas Allan was the purchaser of it on his own account, the difference between the price and the amount at which the account stood should have been written off as a desperate debt, and the balance only should have been stated as "the estate of Campse" in the company stock account, as due by the proprietor of it to the company; whereas, by keeping the account on the former footing, on the supposition that this was equivalent to an entry, "Thomas "Allan for the estate of Campse," of which he was the

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

proprietor, which must be the supposition of the majority of the Court, he in fact takes upon himself the whole of the debt, and makes himself debtor to the new company for what it cost the company, which was then 9,966*l.* 19*s.* 5*d.*, getting in return only an estate purchased for 7,000*l.*, making a present of the difference to the new company, without any equivalent or reason of any kind.

The whole, however, is quite intelligible if Thomas Allan was still merely the trustee for the company, and held these lands till an eligible time for disposing of them occurred; and moreover this view is fully confirmed by the explanation given by the surviving partners in their examination under the Bankrupt Act, that Campse was always reckoned by them to be company property.

That Thomas Allan was appointed a commissioner of supply in Fife, and also enrolled under the Reform Act, seems of little moment. The first was to protect the interest of the estate of which he was ostensibly and feudally the owner, and the other was a very reasonable advantage given to the senior partner, whose interest, though joint with Mr. Wight, was far beyond the requisite qualification.

There is not a single allegation that Thomas Allan exercised any act of ownership different from what he would have done as trustee for the company; and the most important he did exercise, granting the bond in 1832, was for behoof of the company.

Upon the whole, I am satisfied that it was company property at the date of the bond in July 1834; and therefore, in that view of the case, in concurrence with the unanimous opinion of the consulted Judges, I hold that, so far as extends to a security over this estate, this bond is not challengeable under 1661, chapter 24.

Again, with regard to Lauriston, I must own that I have at different times entertained different opinions, and that, as a question inter socios, it is very difficult to reconcile the entries in the books to the supposition, that at first, at least, Thomas Allan was more than trustee for the company; but, upon the whole, I now concur with the view taken by the great majority of the consulted Judges. I think there is a

sufficient distinction between the case of these lands and Campse to induce me to hold that Lauriston, at least at the date of the security in 1832, was the private property of Thomas Allan.

The chief differences are these:—

1. The company had no previous connexion with Lauriston, and that Thomas Allan appears alone making the purchase in 1823.

2. That he was enrolled as a freeholder on it under the old system.

3. That after making extensive improvements, the money for which, as well as the price, was no doubt advanced by the company, Thomas Allan used it as a residence, without stating any rent for it and the pleasure grounds.

4. He excambed a part with Muirhouse, and acted in all respects as proprietor, the company never interfering, so far as is seen, even in the management.

No doubt the price was not taken from Thomas Allan's account, although it is said that at the time there was 23,591*l.* at his credit; but an account was opened for it in the books of the company under the head of "Estate of "Lauriston," commencing with the original price, 24,000*l.*, and continued till it amounted to 46,000*l.*; and this was always stated as stock due to the company, certainly a very false mode of stating this account, and true only in the event of Thomas Allan having funds to pay it, or that the estate itself was worth this sum; but this is so far different from the account for Campse (and this may be stated as a fifth difference between Lauriston and it), that on the arrangement for the new company there was no part of this account which could be written off as a desperate debt, the whole arising from the price and improvements on it, and the account being stated accurately if Thomas Allan was purchaser, and borrowed both the price and the expense for improvements from the company, and of course stood their debtor for the amount.

It is difficult to account for the purchase and extensive improvements on this estate on either supposition of its being a company or individual purchase. Robert Allan and Son

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

were insolvent in 1834. The only object could be the very blameable one of keeping up a false credit with the public; and the mode of entering this and Campse as stock gave a fallacious view of the affairs of the company, if possible, to deceive themselves; for it was only their real marketable worth that should have been so entered. If Thomas Allan was the purchaser, it seems just as difficult to account for the purchase.

In August 1831 a new company was formed by the assumption of young Allan. By this time Mr. Wight, the only other partner besides Thomas Allan, probably saw that this was a bad adventure, and accordingly an arrangement was made about it in the articles of agreement, in these words, "That Lauriston be taken as Thomas Allan's own "speculation, he paying the firm three per cent. interest "upon the stock, and upon what is or may be laid out upon "that property."

Now this is the sixth circumstance which distinguishes this case from Campse, for there is no such declaration as to the latter; and as the circumstances which indicated Thomas Allan as proprietor of it are not near so strong as those which show him proprietor of Lauriston, if it was fit to ascertain his title to this last, still more would it have been necessary to do so as to Campse, if it had really been Thomas Allan's private property.

From the date of these articles of agreement I think that Lauriston became, though it may not have been before, Thomas Allan's "own speculation." This term is remarkable; and the circumstance that only three per cent. was to be charged on so large an advance to a partner, contrary to the usage of the house, for all such advances are distinctly stated in the same articles to be at the usual rate of discounting bills, looks very like as if it was a speculation which might have been thrown upon the company, and from which, now that it was likely to prove a bad one, Mr. Wight was glad to purchase a release by this accommodation as to interest. There seems no other reason for this. There is no such abatement of the rate of interest on the price of Campse.

In truth, there was no occasion for saying any thing about whose speculation it was to be if it had all along been Thomas Allan's own; and if there was any ground for charging only three per cent., this is all that would have been mentioned in this article, as it was all that was necessary in such a state of the case.

But be this as it may, at least from this date I hold it private property; this being a sufficient discharge of a trust for the company, if it existed, which was latent and merely verbal, leaving the ex facie absolute titles unfettered and uncontrolled; for I do not hold that it was necessary to effect such a transfer, that Thomas Allan should also pay the price.

We have next to consider whether the bond of 1834 is affected by the Act 1661, c. 24.

We have the consulted Judges very nearly equally divided, there being only a majority of one for extending the Act to the case of a disposition by an heir within the year, granted to one of the creditors of the ancestor. We have two very able opinions containing the opposite views of this question by the Court. Upon the fullest consideration of the point, I incline to assent to the view taken by Lord Moncreiff.

I understand perfectly, that in interpreting a statute of our Scottish Parliament, it is competent to give a liberal construction of it, so as to give it the due effect intended by it, and that the Court, in regard to this Statute, have acted on this view; but that it is not competent so to interpret it as to introduce a remedy against another evil not noticed in the Act, which might have made this branch of the law more complete, by obviating other real or supposed defects in our practice. Now, looking to the preamble and inductive clause of the statute, it was to secure a preference to the creditors of the ancestor over the ancestor's estate, against the creditors of the heir, or others contracting with him. This was defeated either by the heir granting dispositions to the prejudice of the ancestor's creditors, or by suffering the estate to be adjudged for his own debt.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

Now the Act has been extended so as to apply to a disposition selling the estate where the price is not extant, although this is not a disposition directly to a creditor; also that it is not confined to an apparent heir, but applies equally to an heir entered; and further, that diligence within the three years, though not completed by the ancestor's creditor, is sufficient. In all of these there was a clear contemplation of the object and design of the statute. But it would be quite different to convert it into an enactment for regulating the competition of the ancestor's creditors inter se, as to which there is not a word in the preamble. Before this Act there was nothing to prevent them obtaining a preference by diligence against the ancestor's estate, either by using diligence or obtaining a disposition from the heir. The first real right obtained either by a voluntary act or by diligence would be preferable. Is this taken away by this Act? Are any of the rights of the ancestor's creditors abridged by it? On the contrary, is not the only object of it to extend their privilege, by preventing, for a period of three years, any interference by the creditors of the heir with their diligence, and during the first year absolutely any act of the heir to prejudice them? It is well remarked, that neither M'Kenzie, nor Stair, nor Bankton say that the operation of this statute extends to the case supposed; and Erskine directly says it does not. I do not think he founds on either of the decisions so well analysed and explained by Lord Corehouse; and I do not consider the point decided by the Court on either of them. They waived deciding it in the one, and I do not see distinctly that it occurred in the other; so that there probably is some inaccuracy in the note of Lord Harcarse. But at all events the Court did not then hold that a creditor of the ancestor could not be gratified. None of our institutional writers say this was the effect of the Statute, and Erskine distinctly says that it does not apply to this case; so that I am inclined to hold that the Act 1661 does not meet the present case.

But, after all, I do not very distinctly perceive how this point arises in the present case. The allegation is, that the

bond was given to a creditor of the ancestor. In so far as it is a bond of corroboration of the former bond, it might be so; but in so far as it was a new bond for a further sum of 22,000*l.*, which was instantly advanced, I do not see how this can be said to have been advanced to a creditor of the ancestor. The bank was not directly a creditor of Thomas Allan's, neither was the money directly applied to pay off any debt of his. It might have been used to pay off debts for which he was liable as a partner of the company; but the company was the principal debtor, and he only subsidiary; and even this the bank do not undertake to show, for they say, "It might perhaps be difficult to show pre-"cisely how far the money raised upon this security was "paid by the company to parties, who, but for such pay-"ment, would now be claiming as creditors of Thomas "Allan." If it had been credited to Thomas Allan's account as a discharge of so much of the debt he owed the company, this would have raised the question; but this was not the application of the money; the money was advanced to, and applied to the use of, the existing company for their subsequent transactions. But this is a point which has attracted little attention, and perhaps there may be nothing in the observation I have made; I throw it out merely as a difficulty, and, according to the opinions given, it can have no influence on the judgment.

The next point is, whether the views in the case of Devaynes, and the judgment in the case of Houston, as reversed by the House of Lords, compel us to find that the balance due under the bond in 1832, at Thomas Allan's death, was discharged by the payments into the account, without taking into view the corresponding drafts on the other side.

I hold that the copartnery expired at the death of Thomas Allan, notwithstanding the clause for regulating the interests of the representatives of a deceased partner in the stocks of the company. I further hold, that the bond of 1832 was only for the transactions of the company of which Thomas Allan was a partner, contrary to what, in practice at least, was at one time held to be the effect of a company con-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Opinions of Court.

tinuing under the same firm, and undertaking all the responsibilities, and succeeding to all the claims, of the original company; but I entirely adopt the view of Lord Moncreiff, and a majority of the consulted Judges, on this part of the case. I have always considered it the most palpable misapplication of a principle, to hold that the judgment of Sir William Grant in Clayton's case should regulate this, which is just the opposite case, and deprive the creditor of his privilege of applying an indefinite payment in the manner he thinks most favourable to himself, more especially when it is perfectly obvious that the payments the bank continues to make are on the faith and the security of the payments made to it on the opposite side of the account; and nothing can be so unjust as to apply these to discharge the balance secured under the bond, and leave the payments on the other side not only unsecured by the bond, but not even in so far diminished by the payments which have been made into the account, which, in fact, were the inductive cause of the subsequent payments by the bank.

In Clayton's case the account is always in favour of Devaynes and Company, that is, they always have money of Clayton's in their hands. Devaynes dies, the company continues, and Clayton continues to deal with them, to draw his money out and pay it in. The first transaction is a draft showing he was drawing his own money; soon after, the banking house fails, and Clayton claimed the balance due at Devaynes' death from Devaynes' representatives. Sir William Grant held that the customer drawing out his money had not the privilege of appropriating it as an indefinite payment, but that, in such a current bank account, the draft must be applied to the oldest deposit; so that he could not say I have drawn out the sums subsequently paid in, but have left untouched the balance due to me at Devaynes death.

That is sound. But the principle is totally inapplicable in this case. There the payments by the bankers were made because it was the customer's own money deposited with them. They were indebted to him; they were thus

bound to pay his drafts, and these drafts discharged the debt due by them. Here the bank owed Allan and Son nothing; on the contrary, the bank was their creditors, and when the bank answered these drafts, it was not that the bank was paying a debt it owed, but, on the contrary, was making a further advance on the faith of the payments to be made by Allan and Son; and when such payments are made, being indefinite payments, I cannot see why the bank should not have the usual privilege of a creditor to place them to the discharge of the debt least secured, more especially when the advances are made on the faith of these very payments.

But then I doubt if my view of the law will much assist the defenders; for it seems admitted, that prior to the date of the bond 1834, the debt under the former bond had been reduced to 400*l.*, and the interest due on the account. Now I do not think that, under the bond granted by Robert Allan within the year of his father's death, the balance could be increased. So far as it is a bond of corroboration, it cannot have greater effect than the original bond; it is only to confirm it, and I think the effect of it can only be to cover the original balance under it, in so far as it remained unreduced by payments, taking into view the payments on both sides of the account; and this, as already said, leaves only a balance of 400*l.*, and the interest due on the account, to be recovered under the bond of 1832, which to that effect still subsists and requires no corroboration.

So far as payments were made under it, so as to raise the debt which, at its date, was only 400*l.* up to 20,000*l.*, it is an advance made under this new bond to the new company; and the bond to that extent must be reducible if the estates are held to have been individual property, and that the Act 1661 applies.

The defenders appealed.

Appellants. — The respondents have not instructed that the estates of Campse and Lauriston were the pro-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Appellants Argument.

perty of Thomas Allan individually. On the contrary, it sufficiently appears from the evidence in the cause, commented on by the minority of the consulted Judges, that these estates were not the absolute property of Thomas Allan as an individual, but truly belonged to the company of Robert Allan and Son, although the formal title was made up in the name and person of Thomas Allan, the principal partner of the company.

The security which the appellants got under the bond of 1832 continued as an effectual guarantee even after the death of Thomas Allan; and, at all events, it is effectual for the balance which was due at Thomas Allan's death, or at the 31st of December thereafter, and the appellants are not precluded, by any thing that has happened, from still striking the balance at one or other of these dates, if it shall be held that they were in error in supposing that they had an effectual security down to the date of the bankruptcy.

No dissolution of the company of Robert Allan and Son took place in consequence of the death of Thomas Allan, either as at the date of his death, or of the balance following thereafter, or at any subsequent period; and consequently the bond of 30th March 1832 remained in force, as a continuing guarantee and security over the estate of Lauriston, to cover all advances, or balance due upon advances, made by the appellants to the company, down to the date of its final sequestration on the 2d of September 1834. Or, alternatively, supposing it were held that a dissolution did take place, either at the 12th September 1833, when Mr. Allan died, at at the 31st December thereafter, when the annual balance of the books was made, the appellants are entitled, in the circumstances, to remodel

their account, and to make a separation between their transactions with the old and the new companies, so as to leave any balance due upon the old company's account in the same situation as at the time when such dissolution may be held to have taken place; and for all such balance, at least, with interest, the bond over the estate of Lauriston remains in force as a security.

There are material particulars distinguishing this from Devaynes' case[1]; and this House ought not to enforce the principle there laid down, which is evidently carried out to its fullest extent, unless in a situation where there can be no doubt of the perfect parity of the circumstances in which it is to be applied. The first point of difference which presents itself is in the nature of the two accounts, and the manner in which they were respectively operated upon. In the case of Devaynes it was a deposit account, in which the bankers, of course, were always debtors, or at the best on even squares with their customer. When after Devaynes' death Clayton, the customer, proceeded to make drafts upon this account, he had nothing to draw out except the sum at his credit at the date of the death. The bankers were never to be his creditors for advances beyond the amount of his deposits, but were always to be his debtors for the sums actually deposited; so that when he began to operate on his account after Devaynes' death, he must be held to have commenced a course of drawing on the sum then due, and to have continued in the same course by all his subsequent drafts, until the whole of it was truly paid to him. The case of De-

[1] 1 Merivale, 604.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Appellants Argument.

vaynes was one betwixt the parties themselves, and does not apply. The case of Pease v. Hearn and others[1] may be referred to as more applicable. In the present case, however, the account was not a deposit account, depending on the personal credit of the party in whose hands a deposit is made. The transaction was of the nature of voluntary payments made by a bank to parties to whom they had allowed a cash credit for the very purpose of being afterwards drawn upon; and there was also this further difference, that the basis of the operations all along was not a mere personal credit, but a special, tangible security, to which both parties looked throughout the whole course of their dealings. The company relied upon it as the source of the credit they obtained, and the bank held it as a certain guarantee for repayment of all their advances. It was not a security for a debt already contracted, or for the result of a set of transactions previously begun, but it was the original foundation of every thing that took place subsequently to its date; and it was only on the faith of its being still in subsistence that the company continued to draw, and the bank to make advances, after the event which must now be assumed to have had the effect of operating a dissolution of the company.

If the account be taken as one unbroken and continuous state of debt and credit between the parties, and the question is to be ruled by the principle of Devaynes' case, without reference to the existence of the security, it cannot be disputed that at the date of the said second bond the whole of the appellants advances to the company were satisfied and paid, with the excep-

[1] 5 Barn. & Cress.

tion of about 400*l.* and interest. By the very nature of the transactions, indeed, the balance on the account was constantly fluctuating; and the appellants have no hesitation in admitting that, between the date of Mr. Allan's death and the date of the second bond, periods might even be pitched upon when, in consequence of the sums paid in by the company, and standing at their credit, there was no balance whatever due. But these facts will not determine the question, which stands in such peculiar circumstances as to render the rule of Devaynes' case altogether inapplicable in the way and to the extent to which the respondents would apply it.

On the supposition that the estates, or either of them, truly belonged to Thomas Allan himself and not to the company, the Statute 1661, c. 24, would not apply to the present case; because the conveyance challenged was truly a conveyance in favour of creditors of Thomas Allan the ancestor, and the statute does not strike at such a conveyance as that in question. None of the Judges, with the exception of Lord Medwyn, doubted that the conveyance in question must be held to have been a conveyance truly in favour of creditors of Thomas Allan; but the doubt was, whether a conveyance made by the heir, within the year, in favour of a limited number, one or more, of the creditors of the ancestor, to the exclusion of the other creditors of the ancestor, was reducible under the provisions of the Act 1661. The appellants contended that it was not; that the statute did not apply. Four of the Judges, viz. Lords Moncreiff, Gillies, Jeffrey, and Cuninghame, held that the conveyance was not reducible, thereby giving effect to the argument of the appellants. Five of the Judges, viz. the Lord President, the Lord Justice Clerk, Lords

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Appellants Argument.

Corehouse, Fullerton, and Cockburn, held that the conveyance was reducible, thereby giving effect to the view of the statute taken by the pursuers. Two of the Judges, viz. Lords Meadowbank and Mackenzie, at first held that it was not reducible, and afterwards held that it was reducible. One Judge, Lord Medwyn, was of opinion that the conveyance was not to be held as a conveyance in favour of any creditors of the ancestor, and therefore that it was reducible; but was of opinion, that if the conveyance was in favour of creditors of the ancestor, it would not be reducible. His Lordship's opinion, therefore, rested on a view of the fact not adopted or concurred in by any of the other Judges; but his opinion, on the abstract point of law, was favourable to the view of the statute contended for by the appellants. There is no case in which a conveyance in favour of one or more of the creditors of the ancestor has been cut down as contrary to the provisions of the statute, or has been held to be within the range or contemplation of the statute; in short, the statute has never before been applied or held by the Court to apply to such a case. With the exception of an opinion expressed by Professor Bell, in a recent edition of one of his works, contrary to the opinion expressed in former editions of the same work, no text writer, from the date of the Statute 1661 downwards, has said that it strikes at a conveyance in favour of a creditor or creditors of the ancestor, though all of these writers have commented upon the statute and explained its bearing, and what conveyances it does strike at, according to their understanding of its enactments. The absence of the expression of any opinion, by any text writer or commentator, in favour of the application or extension of the statute

to a class of cases, so large and so obvious, is indeed a pregnant negative. It goes far to show that the statute was not understood to apply to that class of cases, and that the extension of it now attempted by the pursuers is beyond its true and received purpose and meaning. But there is more than negative testimony in favour of the appellants view. There is the positive expressed opinion of Mr. Erskine [1] in his Institute.

The construction contended for by the respondents proceeds upon the assumption, that the statute was intended to regulate questions between the creditors of the ancestor, while no such purpose is disclosed in the preamble, or expressly stated anywhere; and also, upon the assumption that the statute contains a "pure and "absolute prohibition" on the heir, to sell intra annum deliberandi, for any cause, or under any circumstances, whereas the statute contains no such pure and absolute prohibition. The prohibition it does contain bears express reference to the protection of the interests of the ancestor's creditors against the heir and his creditors; and so far from saying that every right and disposition shall be invalid, there is the express limitation to dispositions which prejudice the predecessor's creditors. It is said that the reason of the statute, and in particular the reference which it makes to dispositions by the heir, before the ancestor's creditors have come to the knowledge of the death, shows that it was intended to preserve matters entire and without change, until the creditors of the ancestor should have an opportunity of hearing of his death, and taking steps to attach his estate. But it must be remembered that the ancestor,

[1] Ersk. 3. 8. 102.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Appellants Argument.

while in life, had power to convey the estate to one or more of his creditors, and that the heir doing so puts the other creditors in no worse situation. It is not pretended that the statute was intended to prevent some of the creditors of the ancestor from attaching the estate by diligence to the prejudice of the rest of the ancestor's creditors, and therefore it could not have been intended to preserve that absolute equality which the respondents contend for. The object of the statute was to make every man's estate go to satisfy his own debts rather than to satisfy the debts and extravagance of his heir, and that is the view which has hitherto been taken of it by all the writers.

The construction contended for adversely might lead to very extravagant consequences, which certainly could not have been within the purview of the statute. Put the case that, before the expiry of the year, the heir, with the consent of all the known creditors of his ancestor, sells the estate and divides the price among them, but that afterwards a creditor of the ancestor, not at the time known to have been so, comes forward and brings a reduction of the sale as contrary to the statute, according to the view of the statute taken by the respondents, that reduction would be successful; and yet it is difficult to figure anything less clearly implied, or more clearly not expressed in the words used. If the price of the estate be applied to debts of the ancestor, no matter how the ancestor's creditors dispose of the money.

[*Lord Chancellor.*—Then the argument is, that within year and day the heir may borrow money for the ancestor's creditors.]

Yes; more especially if not for the heir himself.

[*Lord Chancellor.*—But here the object of the son was to get advances for his own firm.]

Certainly; but only to enable that firm to pay the debts of the ancestor.

Respondents.—The estates of Campse and Lauriston, to both of which an absolute feudal title was completed in the person of Thomas Allan, were not held in trust by Thomas Allan for the company of Robert Allan and Son, of which he was a partner, but were the private property of Thomas Allan as an individual, not only at the period of his death, but long prior to it.

The first cash credit bond in favour of the appellants, of date the 30th March 1832, by which Thomas Allan interposed the security of the estate of Lauriston as a security to the appellants, being a bond, the personal obligation in which was an obligation by the then subsisting company of Robert Allan and Son, and by the individual partners thereof (namely, Thomas Allan, Alexander Wight, and Robert Allan,) for cash advances to be made by the appellants to that company, the personal obligation fell upon the dissolution of that company, or upon any change which rendered the firm of Robert Allan and Son in reality a new company, and the personal obligation of the company for which Thomas Allan thus interposed the security of his estate falling, the special security he so interposed could not afterwards subsist as a continuous security, so as to cover any advances which might be subsequently made; and because the said first cash credit bond, in so far as it gives a security to the appellants over the estate of Lauriston, cannot, in the circumstances, be construed as having been intended to create, or as having created,

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Respondents Argument.

a security for any cash credit or advances, except to the said company of Robert Allan and Son, of which Thomas Allan was a partner; and therefore the security must be held to have ceased to be a fund of credit as soon as the said company was dissolved, and Thomas Allan's connexion therewith put an end to.

For it is clear in law that the firm of Robert Allan and Son, of which Thomas Allan, Alexander Wight, and Robert Allan were the individual partners, was dissolved by the death of Thomas Allan, on the 12th of September 1833; so that the responsibilities of Thomas Allan, and his estate and representatives, to the appellants, under the said first cash credit bond in their favour, by which they held the estate of Lauriston as a security for their cash advances, terminated as on the said 12th day of September 1833; or if the said company was not dissolved on the said 12th day of September 1833, so as to terminate, as at that date, the foresaid responsibilities, these responsibilities terminated either as at the 31st day of December 1833, being the first balance thereafter of the books of Robert Allan and Son, or at the 29th July 1834, being the date of the second bond granted to the appellants by the company of Robert Allan and Son, of which Alexander Wight and Robert Allan alone were the individual partners.

In the first place, taking the responsibilities of Thomas Allan and his estate and representatives under the foresaid first cash credit bond to have been limited to the balance due on the cash account with the appellants as at the 12th September 1833, the date of Thomas Allan's death, or to the balance due, striking it upon the whole account, as at the 31st day of December following, being the date of the first balance of the com-

pany's books after Thomas Allan's death, the said balances were, with reference to the subsequent state of that account, paid off prior to the 29th July 1834, the date of the foresaid second bond in favour of the appellants, and the said first bond and security therein contained extinguished; in respect that no new cash account was opened by the appellants after Thomas Allan's death, the account being continued to be kept as one continuous account, in which the transactions before and after the death of Thomas Allan were blended together, and placing the payments made into the account subsequent to the 12th September 1833, without looking at the subsequent drawings out, against the balance due on the 12th September 1833, or, in other words, applying these payments to the first articles on the debit side of the account, the whole of the said balance was not only cleared off before the 29th July 1834, the date of the second bond, but there would have been a large balance against the appellants; and, in the same way, placing the payments made into the account subsequent to the 31st December 1833, without looking at the subsequent drawings out, against the balance due at the 31st December 1833 (the balance being struck upon the whole operations on both sides of the account down to that date), or, in other words, applying these payments to the first articles at the debit side, the whole of the said balance was wiped off before the 29th July 1834, the date of the new bond.

And in the second place, taking the responsibilities of Thomas Allan and his estate and representatives under the foresaid first cash credit bond to have been limited to the balance due on the cash account with the appellants at either of the foresaid dates, and having reference to

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Respondents Argument.

the subsequent state of the account, these balances, if not wholly extinguished, were at all events paid off, except to a very small amount, prior to the 29th July 1834, the date of the second bond; in respect that no new cash account was opened by the appellants after Thomas Allan's death, the account being continued to be kept as one continuous account, in which the transactions before and after the death of Thomas Allan were blended together; and taking both sides of the account as a continuous account from the first, down to the 23d July 1834, and including both the payments made to the appellants by the company of Robert Allan and Son after the death of Thomas Allan, and the payments made by the appellants to the company upon their orders, the whole sum due to the appellants at the 23d July 1834 amounted only to 400*l.* exclusive of interest.

As to the authorities applicable to this, the most important branch of the case, the respondents relied below mainly on the case of Devaynes (already cited), the application of which, even yet, the appellants dispute, and now found rather on Pease v. Hearn[1], which clearly has no application. But the respondents may, in addition, refer to Simson v. Ingham[2], Pemberton v. Oakes[3], Aiken v. Knight, before the Lord Chancellor, on appeal from the Rolls, and where it was held that such an account, if once balanced, cannot be opened up, and Bodenham and Phillips v. Purchas.[4]

In so far as either both Campse and Lauriston, or one or other of them, were the private property of

---

[1] 5 Barn. & Cress.

[2] 2 Barn. & Cress. 65.

[3] 4 Russ. 154.

[4] 2 Barn. & Ald. 39.

Thomas Allan, the conveyance of them by Robert Allan, the eldest son of Thomas Allan, within a year and day of his father's death, by the second bond and disposition in security, of date the 29th July 1834, in favour of the appellants, in security of the sums therein mentioned, was a conveyance by the heir to the prejudice of the predecessor's creditors, reducible under the Act 1661; and this whether the appellants were or were not creditors of Thomas Allan, or of the company of which he was a partner, at the date of the said second bond:—1st, in respect that, even supposing the appellants could be stated to have been creditors of Thomas Allan, any deed by the heir in favour of any one particular creditor of the predecessor is a deed which, in the sense of the Act 1661, prejudges the predecessor's creditors, and consequently, in terms of its enactment, is not valid, "unless it be made and granted a full year "after the defunct's death;" and, 2d, in respect that, assuming that a deed granted within a year and day of the predecessor's death, directly in favour of a particular creditor of the predecessor, did not fall within the statutory sanction of invalidity, still the deed in question would not be valid, seeing that the appellants were not creditors of Thomas Allan, the predecessor of Robert Allan the heir, the granter of the deed; and, that (although it were correct in point of fact, but which is not admitted) it is not a relevant answer to a challenge on the Act 1661, of a deed granted by the heir within year and day of the predecessor's death, to say that the effect of that conveyance was, that by the ultimate application of the money thereby obtained, debts of the predecessor were in some roundabout and circuitous way paid off, and the burdens upon the predecessor's

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Respondents Argument.

estate diminished by its having been relieved of claims which might otherwise have come against it; and that the answer is the more especially irrelevant, where, as in the present instance, it is not and cannot be disputed, that the conveyance by the heir of the predecessor's estate, and the transactions which the appellants entered into with the company carrying on business under the firm of Robert Allan and Son, after the predecessor's death, of which that conveyance was a part, had no connexion with or reference to the predecessor or his creditors, or as respects the transaction itself with his estate, that estate, although conveyed, being conveyed not as his estate, but as the estate of the heir, and conveyed according to the terms of the deed directly, in order to promote the interests of the heir, or of the said company of Robert Allan and Son, of which he was a partner.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the first question which occurs in this case is, whether the estate of Lauriston and Campse ought to be considered as the property of the late Thomas Allan, or as held by him in trust for the firm in which he was a partner; and upon that question I have not been able to find any substantive difficulty.

The negotiation and contract for the purchase of Lauriston was conducted by Mr. Thomas Allan, and in his own name; the title to that property was made up in his own person; he was, in respect of that estate, enrolled as a freeholder of the county of Edinburgh. He enlarged the house, and made extensive improve-

ments on the estate, and lived in the house with his family, for which there is no trace of his having been charged with any rent to the firm. It appears, however, that the purchase money was paid by the firm, and the amount, together with other expenditure in respect of the estate, was not placed to the debit of Mr. Thomas Allan, but was the subject of a separate account, to which all such payments were carried as debits, and all receipts on account of the estate were placed as credits.

That such an account should have been opened proves nothing; for it appears, that other private accounts of Mr. Thomas Allan were kept in the books of the firm, such as the education account of his children; but why the balance was placed to the account of the stock of the firm, and not to the private account of Mr. Thomas Allan, is not explained. It may have been so done because the firm had advanced the money for the purchase of the estate; and it may therefore have been thought right that the property itself should, in their books, be treated as belonging to the firm, till the payment of the purchase money and other expenditure on the estate had been arranged between Mr. Thomas Allan and his partners, although it does not appear that the firm had any security upon the property. But, however that may be, all ambiguity which that mode of keeping the account otherwise might have produced is removed by the notes of agreement entered into upon the admission of Mr. Robert Allan in 1831, the 8th article being, "That Lauriston "be taken as Thomas Allan's own speculation, he "paying the firm 3*l.* per cent. interest upon the cost, "and on what is or may be laid out on the said pro-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Ld. Chancellor's Speech.

"perty." This has been considered in the argument for the appellants as a new contract, giving to Thomas Allan what before belonged to the firm. But it was probably entered into only for the purpose of guarding against the new partner supposing or concluding from the entries in the books that Lauriston was to be considered as the property of the firm; and it does not appear that any change in the mode of keeping the account was adopted on this memorandum being made. The result of a careful examination of the evidence is, that the whole history of the purchase—the title taken —and the declaration of the partners, prove that Lauriston was the private property of Mr. Thomas Allan.

The case of Campse is so far different that the firm had originally an heritable security upon it. The debtor on the bond having been subjected to a sequestration, this property was sold; and it seems doubtful on whose account it was purchased. But in December 1820 it was conveyed by the trustee under the sequestration to Thomas Allan; and soon after by a deed, to which the firm were parties, it was declared that the purchase was made for Thomas Allan as an individual, and the firm assign their security upon the estate to him as the purchaser, acknowledging the receipt of 7,000*l.*, the purchase money.

It is true that the accounts show, in the case of Campse, as in the case of Lauriston, that the purchase money was not paid by Thomas Allan, and that the accounts of the property were kept in the same way as was adopted with respect to Lauriston. But the parties interested have acknowledged that the property belonged to Thomas Allan, and his title was made up as beneficial owner or real proprietor of the estate; and

all his dealings with the property were consistent with his being so. There is not, therefore, I think, sufficient evidence to convert him into a trustee for the firm; so far therefore, I think the judgment of the Court below was clearly right, and in this judgment ten out of the twelve Judges concurred.

The question which it seems expedient to consider, in the next place, is, whether at the time of the date of the second bond any thing was due to the Royal Bank, the appellants, from the estate of Thomas Allan alone. The bond of the 30th of March 1832 was to secure repayment to the Bank of any balance to the extent of 20,000*l.*, which might be due to the Bank from Robert Allan and Son, in which Thomas Allan was a partner, in respect of advances and accommodation to be afforded to them by the Bank. Thomas Allan died in September 1833, and, beyond all doubt, by that event the firm of Robert Allan and Son, as it had up to that time existed, was dissolved, so far as it affected the Bank. That the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of the partner deceased, by special agreement between the partners, cannot affect the question. And it is also quite clear that the security which Thomas Allan so gave to the Bank to secure the repayment of advances made to the firm in which he was a partner,—that is, to himself and his partners,—could not be used as a security for advances made after his death to a firm in which he was not a partner,—that is, to the persons who had been his partners, whether they continued the old style and firm or adopted another.

Now it is not in dispute that the payments made by

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Ld. Chancellor's Speech.

the surviving partners, with whom the account was continued after Thomas Allan's death to the Bank, without any specific appropriation prior to the date of the second bond, exceeded the amount of the debt due to the Bank at the time of Thomas Allan's death; and the appellants admit (as appears on the 59th page of their case) that there were periods between the time of Thomas Allan's death and the date of the second bond at which there was no balance due to the Bank; and that at the date of the second bond there was only a balance of 400*l.* and interest due. So that there is no ground upon which it can be maintained that the debt due at the death of Thomas Allan was not paid at the date of the second bond, except that of the bond of 1832 being available to secure advances made after the death of Thomas Allan, for which there is no pretence.

It seems to have been supposed by some of the learned Judges that the case of Devaynes[1] was not applicable to the present, because this was a case of credit and not of deposit. Those learned Judges recognize the law in Devaynes' case as applicable to Scotland, as indeed the case of Speirs v. Houston[2] assumes it to be. It is to be regretted that the subsequent decisions which have taken place in England upon that subject were not brought under the consideration of those learned Judges. If they had been, I have no doubt but the application of the principle in its full extent to this case would have been recognized by them. Many cases have occurred in this country, but it is sufficient to mention Pemberton v. Oakes,

[1] Ante, p. 197.

[2] 3 W. & S.; 4 Bligh, 215.

4 Russell, 154; Bodenham v. Purchas, 2 Barnewall and Alderson, 39; and Simson v. Ingham, 2 Barnewall and Cresswell, 65; because in one or other of those cases all the circumstances occurred which have been supposed to distinguish this case from Devaynes' case.[1]

Without, therefore, calling in aid the fact that the whole debt at the time of Thomas Allan's death was destroyed by the balance due to the Bank from the continuing firm having ceased to exist, such debt so due at Thomas Allan's death would have been discharged by the application of the subsequent payments to such debts,—such payments having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them consisting of the old and new transactions, and constituting therefore a continuing account; and from which appropriation it was not competent for the Bank to remove such payments at a subsequent time, when the consequences were seen; as was decided in Bodenham v. Purchas[2], one of the cases I have just referred to.

When therefore Robert Allan, the son of Thomas, executed the second bond to induce the Royal Bank to continue to himself and his then partner the floating credit to the amount of 20,000*l.*, and to advance 22,000*l.* for their use, he was not dealing with a creditor of his father, or giving to any such creditor a security for any debt of his father, but he was providing for a credit to himself, and securing a debt of his own, upon the security of property derived by him from his father, and that within one year of his father's death,

[1] Ante, p. 197.

[2] 2 Barn. & Ald. 39.

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Ld. Chancellor's Speech.

which is precisely the case guarded against by the Statute of 1661, c. 24.

In what way this transaction might operate upon the state of the account between Thomas Allan's estate and the surviving partners does not appear to me to be in the least material. That was not the object or immediate effect of the transaction, and it is not proved that what was advanced by the Bank was applied in payment of the debt due from Thomas Allan to the firm. The question therefore does not arise, whether within the Statute an heir can within the year effectually prefer one of his ancestor's creditors to another, by giving to him a security upon the ancestor's estate. The ground upon which I rest my opinion is, that the bond and security of 1834 was not given to secure or pay any debt of the father.

This case has been most laboriously argued below, and at the bar of this House, and it seems to have engaged very largely the attention of the learned Judges. I cannot say I have felt the difficulties which seem to have been entertained by some others. I think it sufficiently proved that Lauriston and Campse belonged to Thomas Allan individually; that the debt due to the Bank at the time of his death was discharged before the date of the second bond; that the security of 1832 cannot be applied to secure any debt contracted after the death of Thomas Allan; and that his son Robert had no power, by his bond of 1834, to affect the lands for his own benefit, and to secure his own creditors, to the prejudice of the creditors of his father. It follows from this, that, in my opinion, the judgment in the Court below was right, and ought to be affirmed.

Taking this view of the case, it is unnecessary to

consider what the effect of the bond of 1834 would have been upon the liability of Thomas Allan's estate to the Bank, if any debt had remained due upon the bond of 1832. The surviving partners of Thomas Allan would have been primarily liable for the debt, and by the bond of 1834 the creditors took a new security for the 20,000*l.*, and continued the credit for that sum for an indefinite period, which by the bond of 1832, and the law applicable to it, had determined at the death of Thomas Allan.

As to costs, it is true that upon some of the questions considered by the Judges there was a very even balance of opinion; but if a majority had been in favour of the appellants upon some of the questions, it would not have influenced the decision of the cause, a majority upon others of the questions being against them. It does not appear to me that there is in this case sufficient to induce the House to depart from the rule (which I always do with reluctuance) of making an unsuccessful appellant pay the costs of the respondents, who in this case are unsatisfied creditors, who have been under the necessity of instituting these proceedings, and of incuring the great expenses attending their progress, for the purpose of obtaining relief against an act under which the appellants claim, and by which an attempt was made to deprive them of those means of obtaining payment of their debts to which they are entitled. I therefore shall move the House, that the interlocutors appealed from be affirmed, with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, therein complained of, be and the same are hereby affirmed: And it is further or-

ROYAL BANK OF SCOTLAND v. CHRISTIE and others.

6th April 1841.

Judgment.

dered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL — ALEXANDER DOBIE, Solicitors.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1841.

[*29th April* 1841.]

Miss JANE CASAMAIJOR and others, Appellants.[1] (No. 7.)

[*Attorney General* (*Campbell*) — *Lord Advocate* (*Rutherfurd*).]

Messrs. PEARSON and ROBERTSON (Mrs. FOTHRINGHAM's Trustees) and Mrs. PATERSON, Respondents.

[*Pemberton* — *Donaldson.*]

Testament — *Residuary Legatee* — *Annuitant* — *Competition.* — Terms of a trust settlement, where — Held in the circumstances (reversing, in part, interlocutors of the Court of Session): (1.) That two annuitants were respectively entitled to payment of the full amount of their annuities only in so far as the free annual proceeds of the trust fund, during the year for which such annuities were payable, were sufficient for the payment thereof; but that when in any one year the free proceeds exceeded in amount the said two annuities, such excess belonged to

---

[1] Fac. Coll., 6th June 1840.

and became divisible among the residuary legatees: (2.) That upon the death of one of the two annuitants one half of the capital of the trust fund became divisible among the residuary legatees: And (3.) that from and after the death of such annuitant, the other annuitant was entitled to the free income in each year of only one half of the capital of the trust fund; but in any one year when such free income exceeded the amount of her annuity, such excess should belong to the residuary legatees.

2D DIVISION.

Lord Ordinary Moncreiff.

Statement.

THE late Alexander Porterfield of Porterfield, by trust disposition and settlement dated the 16th April 1810, conveyed and disponed to the respondent Alexander Pearson, and Frederick Fothringham, now deceased, and the survivor of them, his whole estate, real and personal, in trust for certain purposes; and among others, in the first place, to sell and dispose of his whole property, as soon after his death as convenient, either by public sale or private bargain, and at such prices as they might think proper; in the second place, to pay, from the first proceeds of his funds and estates, his debts, to fulfil his obligations, and to reimburse themselves of the whole expense attending the execution of the trust; and thirdly, to pay the sum of 500*l.*, bequeathed as a legacy to his sister, Mrs. Camilla Porterfield or Alexander, wife of Boyd Alexander of Southbar.

Then follows this direction:—"I hereby direct and "appoint my said trustees or trustee to pay the follow- "ing annuities to my sisters after named, which I "hereby leave to and settle on them during their "respective lives, viz. to Mrs. Christian Porterfield or "Fothringham, wife of the said Frederick Fothring-

" ham, an annuity of 400*l.* sterling; to Mrs. Ann " Porterfield or Paterson, wife of Lieutenant Colonel " Thomas Paterson, residing in Charlotte Square, " Edinburgh, a like annuity of 400*l.* sterling; to " Mrs. Margaret Porterfield or Buchanan, an annuity " of 200*l.* sterling, and this over and above and in " addition to the annuity already settled on the said " Mrs. Margaret Porterfield or Buchanan by me; " which several annuities hereby provided I direct and " appoint my said trustees or trustee to pay to my said " sisters during all the days of their respective lives, " and that half-yearly, commencing payment thereof " at the second term of Whitsunday or Martinmas " which shall happen after my death, for the year pre- " ceding such first term of payment, and continuing " payment thereafter at two terms in the year, Whit- " sunday and Martinmas, as aforesaid, during the lives " of my said sisters respectively; and for the better " fulfilment of this purpose, I hereby direct and " appoint my said trustees or trustee to vest and lay " out capital sums for answering the foresaid respective " annuities on any security or securities which they or " he may think proper, either personal, heritable, or in " the public funds, and to take said securities in such " terms as he or they may think best adapted for ful- " filling the foresaid purpose; and in the event that " after payment of my debts, fulfilment of the obliga- " tions of which I may stand bound at the time of my " death, payment of the expenses attendant on the " execution hereof, and of the 500*l.* to my said sister " Mrs. Alexander, the residue of the proceeds of my " funds and estate shall not be sufficient for yielding

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

" the foresaid annuities hereby settled on my said " sisters, then it is my meaning and intention that the " said residue, whatever it may be, shall be vested and " laid out, and the interest or dividends arising there- " from be paid unto and divided among my said " three sisters, Mrs. Fothringham, Mrs. Paterson, and " Mrs. Buchanan, during their respective lives, in the " same proportions, and exactly in the same terms in " every respect as above pointed out with respect to " the full annuities of 400*l.*, 400*l.*, and 200*l.*; and I " do hereby direct my said trustees or trustee to regulate " themselves accordingly."

The sixth provision is as follows;—" Sexto, In the " event that the residue of my funds and estate, after " payment of all my debts, fulfilment of all obligations " in which I may stand bound at the time of my death, " payment of the expenses attendant on the execution " of this trust, and of the 500*l.* to my sister Mrs. Alex- " ander, as above mentioned, shall amount to the sum " of 15,000*l.* sterling or upwards, then I hereby direct " and appoint my said trustees or trustee to pay out of " such residue the sum of 1,000*l.* sterling to each of " George and Thomas Patersons, also sons procreated " of the marriage between the said Lieutenant-Colonel " Thomas Paterson and Mrs. Ann Porterfield or Pater- " son; but if such residue shall be under the above " sum of 15,000*l.*, and shall not be less than the sum " of 8,000*l.*, then the said George and Thomas Pater- " sons shall only be entitled to the sum of 500*l.* sterling " each, the remainder of said residue being to be vested " and laid out for yielding the said annuities hereby " provided as aforesaid; but if such residue shall not

"amount to the said sum of 8,000*l.*, then it is my "meaning and intention that the said George and "Thomas Patersons shall not be entitled to receive "anything whatever under this deed, and I direct my "said trustees or trustee to regulate themselves accord-"ingly; the above-mentioned eventual legacies being "to be payable to the said George and Thomas Pater-"sons at the first term of Whitsunday or Martinmas "after my death, with interest from the said term of "payment till paid."

Mr. Porterfield died on the 30th of May 1815. His sister, Mrs. Buchanan, one of the annuitants, predeceased him.

Mrs. Fothringham and Mrs. Paterson, the two other annuitants, survived Mr. Porterfield. The former of them died on the 31st March 1834. The latter is still alive.

On the death of Mr. Porterfield, the respondent Alexander Pearson and the deceased Mr. Fothringham accepted of the trust conferred upon them, and entered upon the management of the trust estate. The amount of Mr. Porterfield's fortune did not turn out so considerable as was expected. The trustees did not sell the lands till the year 1834.

The trustees paid to Mrs. Fothringham and Mrs. Paterson, the only surviving annuitants, at first the whole, and thereafter as large a portion of their several annuities as the funds in their hands arising from the annual revenues of the estate would admit of.

In 1834, a considerable portion of the capital fund became divisible, in consequence of the death of one of the annuitants, Mrs. Fothringham. Doubts having

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

thereupon arisen as to the rights of the several parties who were legatees under Mr. Porterfield's trust disposition and deed of settlement, a process of multiplepoinding was raised in the Court of Session, for the purpose of distributing this portion of the funds and of having the rights and interests of the several claimants judicially ascertained.

A record was prepared betwixt the appellants (legatees) and Mr. Pearson for the annuitants. A separate record was also prepared between (1) the appellants, (2) the representatives of certain of the residuary legatees who had predeceased Mrs. Fothringham, one of the annuitants, and (3) the present respondents, regarding two separate questions. One of these questions was, Whether or not the sum which became tangible by the death of Mrs. Fothringham had become vested in the residuary legatees prior to that event? And the other was, Whether the interest which had become payable on two legacies of 1,000*l.* each, left to George and Thomas Patersons, was payable out of the capital or the annual proceeds of the trust estate? These questions were disposed of by the judgment of this House, 18th July 1839.[1]

The judgment of this House, of 18th July 1839, having been applied, the question as to the annuities betwixt the appellants and Mr. Pearson was discussed. The respondents, as the parties interested in the annuities, came forward and adopted the record prepared by Mr. Pearson.

---

[1] See Rep. in Fac. Coll., 16th Dec. 1836; 15 D., B., & M., 275; M'L. & Rob. 685.

The points insisted on by the parties respectively were[1]: for the appellants, 1st, that on the death of the testator two tenth parts of the capital of the free residue of the trust funds became tangible and divisible among the residuary legatees; 2d, that at least any surplus of the capital of the free trust funds at the time of the testator's death, beyond what was then necessary for securing the annuities payable to Mrs. Fothringham and Mrs. Paterson, did then become tangible and divisible among the said residuary legatees; 3d, that, at all events, any surplus of the annual proceeds of the free residue of the trust estate, which has existed in any year or years during the subsistence of the trust, beyond what was necessary for satisfying the annuities payable for such year or years respectively, was not claimable by the annuitants to make up deficiencies in other years, but that the same, with the interest thereof, belongs to the said residuary legatees; and, 4th, that no other or greater amount of the trust expenses is chargeable on the capital than what would have been a burden on the said capital had the estate been disposed of tempestivè in terms of the trust deed.

For the respondents it was pleaded, that there is a claim competent to the executors of Mrs. Fothringham, or to Mrs. Paterson, to the arrears of annuity due to them prior to Mrs. Fothringham's death, out of the income of the trust funds subsequent to that event; and that they are entitled to have the income of the trust estate, arising subsequent to the death of Mrs. Fothringham, applied in payment of the arrears of annuity which fell due previous to that event.

[1] See prayers of the mutual reclaiming notes.

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

The Lord Ordinary, 20th Dec. 1839, pronounced the following interlocutor, annexing thereto the subjoined note[1]:—"The Lord Ordinary having resumed "consideration of this cause, and having considered the

[1] "*Note.*—Some observations may be necessary or useful.

"1. The judgment of the House of Lords finds 'that the sum appli- "'cable to the payment of the annuities' was 'the residue of the said "'trust fund, after deducting,' &c. It is very clear to the Lord Ordi- "nary that this can only mean that the residue of the estate, after the "deductions specified were made, that is, the free capital is the fund, "the annual issues and profits of which are to be applied in payment of "the annuities. There might, indeed, have been an ambiguity in the "terms employed in the first part of the fourth provision of the trust, "by which the annuities are appointed; because, in general, annuities "given as special legacies, where no other intention is expressed, may "be preferable over the whole capital of the estate. But when the "whole of that fourth provision is read together, there can be no ambi- "guity; because it is in plain words provided, that capital sums are to "be invested for securing and paying the annuities which are afterwards "to be paid to the residuary legatees, but that 'in the event that after "'payment of my debts,' &c. 'the residue of the proceeds of my funds "'and estate shall not be sufficient for yielding the foresaid annuities,' "&c. 'then it is my meaning and intention that the said residue, what- "'ever it may be, shall be vested and laid out, and the interest or "'dividends arising therefrom be paid unto and divided among my said "'three sisters,' &c. in the same proportions; and the testator directs "his trustees to regulate themselves accordingly. The Lord Ordinary "cannot, therefore, entertain any doubt, that all that the annuitants "could claim is, either full payment of their annuities, or, if the estate "did not yield so much in annual produce, the whole interest, dividends, "rents, and profits of the free residue, whatever it might be; and the "judgment of the House of Lords does not import any thing else. "The object of that judgment was singly to find that the two legacies "provided to George and Thomas Patersons must be deducted from the "capital before striking the residue, as well as the debts, expenses, and "the legacy of 500*l.*

"But, on the other hand, there can be as little doubt that the full "annuities of 400*l.* each must be paid to the annuitants, in so far as "the free annual proceeds of the residue of the funds and estate, "reckoned according to the judgment of the House of Lords, were, or "might be at any time during their lives respectively, sufficient for satis- "fying them. Therefore the Lord Ordinary has no doubt, that the "arrears of the annuities unpaid must be made good, in so far as there "are any funds in the hands of the trustee, which consist of rents, pro- "fits, interest, or dividends, accruing from the trust estate in any of the

" interlocutors of the Court, and the judgment of the " House of Lords, as applied by the Court, holds the " state of the trust accounts, No. of process, " the revised objections to that state, for Miss Jane

---

" years during which both the rights of annuity subsisted, although in " particular years the annuities may have been paid in full, while there " was a deficiency in other years.

" 2. The Lord Ordinary thinks it very clear that there is no ground " for the plea, that the annuity which was provided to Mrs. Buchanan " must be considered as a burden on the proceeds of the estate to " diminish the fund for payment of the annuities to Mrs. Fothringham " and Mrs. Paterson. That annuity never existed, having completely " lapsed by Mrs. Buchanan having predeceased the testator. But still " the full annuities of 400*l.* each were provided to Mrs. Fothringham " and Mrs. Paterson, and are found to have been primary and preferable " burdens on the whole proceeds of the estate. The real meaning of the " plea of the objectors is, that the benefit of Mrs. Buchanan's pre- " decease is to accrue to them as residuary legatees, although there " should be a defalcation in the annuities to Mrs. Fothringham and " Mrs. Paterson; in other words, that these annuities shall not be pre- " ferable over the proceeds of the estate, but that the residuary legatees " shall be preferable to them, pro tanto. The Lord Ordinary conceives " this to be contrary both to the express words of the settlement, and to " the final judgment of the Court and the House of Lords. Mrs. Pa- " terson and Mrs. Fothringham's executors are asking nothing in the " right of Mrs. Buchanan, or as emerging to them by her death; for " nothing ever was vested in her, and therefore nothing could so emerge. " They are asking simply their own annuities, and no more; and though " the proceeds appropriated to the payment of them are greater in " consequence of their being relieved of the annuity intended for her, " they are still nothing else but the proceeds of the estate over which " their claim is preferable, aye and until their full annuity shall be " satisfied.

" 3. As Mrs. Paterson is still surviving, the Lord Ordinary thinks it " clear that her full annuity of 400*l.* must be paid de futuro, although " the proceeds of the estate may have been insufficient before Mrs. Foth- " ringham's death to pay both the annuities in full; for her right " remains just what it was, a preferable claim over the whole pro- " ceeds of the estate, though the fund is enlarged by the death of " Mrs. Fothringham.

" 4. The only question on which the Lord Ordinary entertains real " doubt is, how far there is a just claim over the now enlarged proceeds " of the estate to make up retro the deficiencies in the annual proceeds, " to pay the two annuities during Mrs. Fothringham's life. It is with " some difficulty that he has come to be of opinion that this part of the

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

" Casamaijor and others, No. of process, and " the revised answers to those objections, for Alexander " Pearson, No. of process, as now duly lodged; " and having heard parties procurators on the state of

---

" claim is not well founded. In the case of Mrs. Fothringham's " executors, it can hardly be maintained; for, attending particularly to " the words of the settlement, it is evident that the preference given to " the annuities was over the annual proceeds of the estate only, and that " there is no warrant for applying any part of the capital to make up " those annuities. But to give Mrs. Fothringham's executors any part " of the proceeds accruing after her annuity had ceased, would really be " to apply part of the capital, otherwise devolving on the residuary " legatees, to make up her annuities during her life; or, in another " view, it would be to allow her executors to draw annuities after her " whole right to them had fallen by her death. The question is much " nicer in the case of Mrs. Paterson, she being still alive, and in a situ- " ation to say that the whole free proceeds at any time arising should " still be appropriated to the full payment of her annuity from the " beginning. The Lord Ordinary is sensible of the difficulty of denying " effect to this. But, on the whole, considering the anxious terms " of the provision for the payment of proportional sums only out of " the proceeds existing, and the clause regulating the effect of the " failure of one annuitant, he does not think that, on a fair construc- " tion, it can be held to have been the testator's intention to give " such a retro-active effect to the increase of the funds by the death of " an annuitant.

" 5. The Lord Ordinary sees no sufficient ground laid in this process " for any claim on the part of the objectors against the trustee per- " sonally, on account of his administration, or the delay in the sale of " the estate. In all such trusts, there are difficulties which the parties " interested in the ultimate result are very apt to undervalue; and they " are but too much inclined to assign interested or unworthy motives " for what is no more than the ordinary course of such things. If the " objectors meant seriously to make a case of malversation to any effect " against the trustee, they ought to have libelled a proper action of " damages, on such relevant grounds as they might venture to adopt. " All that the Lord Ordinary says, or means to find, is, that there is " no sufficient ground laid in this process for requiring the pursuer to " account on any other principles than those which are applicable to " every trust, containing the usual clauses for the protection of such " trustee.

" 6. But, undoubtedly, the accounts of the trustee rendered must be " duly audited. And the Lord Ordinary certainly thinks, that there " are several matters involved in them which do require investigation. " The points of objection at last insisted in were very few. Indeed,

" the cause, and on the said objections and answers, " finds, that the event of Mrs. Margaret Porterfield or " Buchanan, one of the annuitants, to whose benefit the " proceeds of the trust estate were in the first instance

---

" they were nearly confined to the payments made upon certain bills " said to be prescribed, and the mode of charging interest on the one " side of the account, and allowing interest on the other. But, as there " may be some other questions, the Lord Ordinary has thought it proper " to make the remit to the accountant, in such general terms as to " embrace every thing. He has no belief, however, that the accountant " will find it necessary to make up an entirely new state of accounts, " though it is proper that the whole should be checked, and the result " must be brought out in conformity to the judgments of the Lord " Ordinary, the Court, and the House of Lords. There is, of course, " some law involved both in the questions regarding the bills and " the mode of stating interest. But so much depends on the facts, " that it is better to see the precise state of them before deciding " any thing.

" 7. A point of some difficulty was in the end debated before the " Lord Ordinary, viz., in what manner the expense of management of " the trust estate should be charged against the fund, that is, whether " against the capital or against the annual produce of that capital. It " is clear enough that the expression in the trust deed, 'the residue of " 'the proceeds of my funds and estate,' means the residue of capital, " after the subjects are converted into money, or at any rate, the residue " of the stock of the estate after the appointed deductions are made " from it, and so the House of Lords have understood it. And there- " fore it is very clear that all the expense incurred in bringing it into " that state must be charged against the capital of the fund, according " to the express terms of the deed and the judgment of the House of " Lords. But the difficulty, which was not at all under the view of that " House, or at all contemplated in the particular finding, is, that there " was an heritable estate, which could not in any view be sold in an " instant, and which was not in fact sold for many years, and the material " question relates to the expense of managing that estate in the mean- " time. It is not a simple point. On the one hand, the only clauses " of the deed which relate to the expenses of the trust, suppose them to " be deducted, before the residue of the estate is to be struck, the " whole interests and dividends of which are to be paid to the annuitants, " until the full annuities be paid; and it is not at all an ordinary case " of life-rent and fee, but a case of special annuities, appointed to be " paid preferably. On the other hand, the state of the matter to which " the words plainly apply, is not that which occurred: there is no " mention of rents at all; and, therefore, assuming that the trustees did " their duty, and that still the sale of the lands was unavoidably, or, at

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

" appropriated, having died before the testator, had not " the effect of vesting in the residuary legatees any " right over the portion of the capital of the estate or " its proceeds, which must otherwise have been laid out " for securing an annuity of 200*l.* to her during her " life, except in so far as there might be, during the " lives of the two surviving annuitants, Mrs. Fothring- " ham and Mrs. Paterson, a surplus of the annual pro- " ceeds of the whole estate, after paying in full to the " said two annuitants the annuities of 400*l.* each, pro- " vided to them in conformity to the findings herein- " after expressed: Finds, that the full security and " payment of these annuities constituted a primary and " preferable burden on the whole residue of the trust " funds and estate, after deducting the sums necessary " for paying and satisfying the testator's debts and obli- " gations, the expenses of the trust, the legacy of 500*l.* " to Mrs. Alexander, and the two legacies of 1,000*l.* " each payable to George and Thomas Patersons; and " finds, that until the said annuities were fully satisfied, " so far as the whole interests, dividends, rents, or

---

" least in bonâ fide, delayed, the rents can only come in place of interest " or dividends, by inference and construction, by a necessary implication " of intention. Taking this to be the fair and just result, the question " is, whether it can be more than the free rents, after deducting the " ordinary and necessary annual expenses of management that can be " so taken. On the whole, the Lord Ordinary has come to be of " opinion, that the rents cannot be reckoned as surrogatum for interest " or dividends, till after deducting the ordinary expenses required for " producing those rents; but that all extraordinary charges occurring " must be deducted from the capital, when ultimately realized. He " understands that the state of the trustees is made up in some degree " on this footing. But being sensible that there will be difficulty in " the adjustment, he has instructed the accountant to exhibit in a " distinct form all the particulars to be charged the one way or the " other."

" profits of the said free fund or estate might be sufficient for that purpose, no tangible or divisible surplus " fund could arise, during the lifetime of the two annuitants, which could be claimed by the residuary " legatees: Finds, that in determining what shall be " considered as the residue of the said trust estate, and " what shall be considered as the interest, dividends, " rents, or produce of such estate, primarily appropriated to the payment of the said annuities, the whole " expenses incurred in realizing or endeavouring to " realize and convert into money the various subjects " constituting the trust estate, or in changing the securities thereof, must be deducted from the gross capital: " Finds, that the ordinary annual expense of managing " the trust estate, including the ordinary expense of " management and uplifting the rents of the heritable " estate while unsold, must be deducted from the gross " annual rents or profits thereof; but finds, that all " extraordinary expenses brought upon the trust estate " in the course of such management, such as the expense " of processes for the division of a commonty, or for " augmentation of minister's stipends, or any similar " expenses, must be deducted from the capital stock of " the estate: Finds, that in so far as there may have " been at the death of Mrs. Fothringham any arrears " of the said annuities outstanding and unpaid to her or " to Mrs. Paterson, to the utmost extent to which the " free proceeds of the funds and estate, estimated in " conformity to the judgment of the House of Lords " and the above finding, were adequate, in the annual " produce thereof, to the full payment of the said annuities, such arrears must be paid in preference to " any claim by the residuary legatees; and finds, that

CASAMAJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

" in case there may have been a surplus of the said " annual produce beyond the payment of the said an- " nuities in any one year or more years, preceding the " death of Mrs. Fothringham, such surplus must be " applied to make up any deficiency thereof in other " years of the said period: Finds, that a portion of the " capital stock or money previously appropriated to the " security and payment of the said two annuities, but " which has been set free by the death of Mrs. Foth- " ringham, one of the said annuitants, must, so far as " necessary, be laid out for securing to Mrs. Paterson, " the surviving annuitant, in conjunction with the re- " maining sum already invested, the full payment of her " said annuity of 400*l.* during all the years and terms " of her life, posterior to the term for which the annuity " to Mrs. Fothringham was last payable; but in respect " that the purpose of the payment of the said annuities " in full is provided for solely by the investment of " capital sums sufficient to yield an equal amount in " the proceeds thereof, and that it is expressly declared " in the trust deed, that in the event that 'the residue " 'of the proceeds of my estate shall not be sufficient " 'for yielding the foresaid annuities hereby settled,' &c. " the testator's 'meaning and intention' is, that the " residue, whatever it may be, shall be invested, and the " interest or dividends thereof paid to the annuitants, in " the proportions of their several annuities: Finds, that " there is no warrant in the trust deed for applying any " part of the capital of the trust estate for making up " any deficiency in the said 'proceeds' thereof, for pay- " ing the emerging annuities as they fell due during " the lives of the annuitants respectively; therefore " finds no claim competent to Mrs. Paterson, or to the

" executors of Mrs. Fothringham, for sums alleged to " be due as arrears of annuities falling due prior to " Mrs. Fothringham's death, in so far as it may appear " that the whole interest, dividends, or profits of the " free proceeds of the estate being insufficient for the " payment of the full annuities were paid to them, or " may be payable under the previous finding of this " interlocutor, proportionally, according to the terms " of the trust deed: Finds no sufficient or relevant " ground set forth in the process for impeaching the " management of the trustees in the exercise of the " discretion committed to them, with regard to the time " and manner of bringing the heritable property, com- " posing the chief part of the trust estate, to sale: and " finds, that the trust accounts as between the pursuer, " as surviving trustee, and the objectors, as residuary " legatees, must be settled and adjusted in this process, " on the footing of the sale and previous administration " having been in this respect duly conducted; and, " before further answer, at the desire of both the " parties, remits the whole accounts of the pursuer to " Mr. William Moncreiff, accountant in Edinburgh, " with instructions to consider the accounts as made up " by the accountant employed by the pursuer, with the " vouchers thereof, and the revised objections and re- " vised answers for the parties, having in view the " points of law determined by the Lord Ordinary's " former interlocutor, adhered to by the Court, so far " as the same has been affirmed by the House of Lords, " and by the judgment of the House of Lords itself, " and also having in view the findings of this inter- " locutor, with power to him to call for all explanations " from the parties which he may think necessary, and

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Statement.

" for inspection of whatever books he may require for " enabling him to make a satisfactory report on the " matters still in dispute, and to report to the Lord " Ordinary how far the account produced exhibits a " just and true account of the pursuer's intromissions " with the trust estate and funds, according to the " principles laid down in the said interlocutors and " judgment; and in case it shall appear to him that " it is in any respects insufficient or unsatisfactory, to " state particularly the objections which arise to it, and " the grounds of them, and in general, having regard " to the said state of accounts, as reported by the " accountant to the pursuer, to report to the Lord " Ordinary what is the just and true state of the " account between the pursuer and the parties severally " interested in the trust estate; and further instructs " the accountant, that in framing his report, with " reference to the expenses of the trust management, " under the findings of this interlocutor, he do exhibit " in a distinct form the particular articles of expense " which are charged severally against the capital and " against the yearly rents, interest, or dividends of the " said trust funds and estate; and recommends to him " to prepare his report as soon as circumstances will " enable him to do so."

Both parties reclaimed, insisting respectively on the points above stated. The Court (6th June 1840) pronounced the following interlocutor: — " The Lords, " having advised the reclaiming notes for the parties, " and heard counsel thereon, alter the interlocutor of " the Lord Ordinary, in so far as it finds no claim " competent to Mrs. Paterson for sums alleged to

Judgment of Court, 6th June 1840.

" be due as arrears of annuities falling due prior to " Mrs. Fothringham's death, in so far as it may ap- " pear that the whole interests, dividends, or profits of " the free proceeds of the estate, being insufficient for " the payment of the full annuities, were paid to " Mrs. Fothringham and Mrs. Paterson, or may be " payable under the previous finding of the Lord " Ordinary's interlocutor, proportionally according to " the terms of the trust deed; and find that Mrs. Pa- " terson is entitled to payment of the whole arrears of " annuity due to her out of the interest, dividends, or " profits of the free proceeds of the whole trust estate " accruing during her own lifetime; quoad ultra, " adhere to the interlocutor reclaimed against, and " refuse the desire of both reclaiming notes, reserving " all questions of expenses, and decern."

Miss Casamaijor and others appealed.

It was admitted by both parties, in the argument at the hearing, that a questio voluntatis, depending upon the terms of the trust settlement, was to be decided. The Court had to a certain extent differed from the interlocutor of the Lord Ordinary; his Lordship himself, in the Inner House, at the same time having changed the opinion he had stated in the Outer House. It was admitted that there was no authority in the text writers or decisions in the law of Scotland which could assist in the decision of the points in dispute. The grounds of the judgment and declaration by the House are stated in the following opinion delivered by the Lord Chancellor.

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, This case, which has unfortunately been the subject a second time of appeal to your Lordships' House, raises a question of some difficulty, from the obscurity of the mode of expression which has been adopted by the author of the trust deed upon which the question arises. With regard to the former appeal, I will only observe that nothing that was decided upon that occasion will have the slightest reference to the present appeal. It regarded totally different interests and different parts of the trust deed. The questions now for consideration, therefore, are totally unaffected by any thing which was decided by this House, or by the Court of Session, upon the former occasion.

The circumstances which gave rise to the present questions are shortly these:—Provision was made in this trust deed for three annuities; and, subject to the interest of those annuities, a gift was made to certain persons who were entitled to the residue of the estate. The testator, it appears, had three sisters; one sister died before his own death. The provision was, that the property should be sold, and the proceeds invested in sufficient sums to provide for the payment of those annuities.

Now, one question raised was, whether the amount which would have been necessary to provide for the annuity of the sister who predeceased was, or was not, applicable to a fund for the payment of the other annuities; or whether it was to go immediately to those who were to take in remainder upon the death of the annuitant. But the short answer to that claim is, that the annuity having lapsed by the previous death of

the legatee, at the moment of the death of the author of the trust there was no such annuity and no such legacy. That sum, therefore, was a fund applicable to pay those legacies and annuities which remained. The legacies and annuities which remained were the two annuities of 400*l.* to each of the surviving sisters. The deed, therefore, must be read and construed as if there were no such disposition in it. Upon that point there does not appear to be any difficulty whatever; and I apprehend it to be quite clear that the Court of Session were right in holding that the property which existed at the time of the testator's death was applicable to pay the two annuities of 400*l.* each.

But, my Lords, the difficulty arose here. The testator had directed the property to be sold, and out of the proceeds of the sale sufficient sums to be invested to answer those two annuities and the legacies. His death took place many years ago, and the property was not sold. It remained in the character of land, and produced an income which it appears, for the first year after the death, was more than sufficient to pay the annuities of 400*l.* to the two sisters, but which at a subsequent time did not produce sufficient to pay those two annuities. Nothing however was done; no sale took place; no application was made by the annuitants to have a sale; no application was made by the residuary legatees to have a sale; but the property remained as land for several years. To the extent of the income of the land, whatever was produced after paying the prior charges was paid over to the annuitants, leaving at first a surplus, and subsequently not producing enough to pay the annuities. Then one of the annuitants died — one of

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

the sisters died; and the surviving sister makes this claim, which has been recognized by the Court of Session (the Court of Session differing in this respect from the opinion first expressed by the Lord Ordinary), namely, that the surviving sister has not only a title to the income which may arise from one half of the property which was devoted to the payment of that annuity, but that she has a title, as against the moiety released by the death of the sister, to the arrears of the annuity which were not paid out of the proceeds of the land at the time of the testator's death. Another claim was made, that the surplus income which arose in the first year after the death of the testator is also applicable to pay the subsequent deficiencies. The Court, however, have decided that this is a privilege belonging to the surviving sister alone; and that the representatives of the sister who is dead are bound to take that which the estate produces, and have no claim against any part of the property for the payment of the deficiency.

I cannot but think that there has not been quite that accurate attention paid by the Court below to the terms in which this property is devoted to the payment of the annuities, and in which it is afterwards given over, which might have been bestowed upon it, and which, if understood in the sense in which I understand them, would have prevented all the difficulty which has arisen in the Court below in dealing with those minute parts of the case, inasmuch as, according to the construction which I put upon this instrument, there is no room left for raising those minor points. It is clear that the testator contemplated two events. It is clear that he contemplated an immediate sale. He directs an immediate sale;

and it is contrary to his intention, and contrary to the expectations he entertains, that an immediate sale should not take place.

Perhaps before I advert to the particular language used in this instrument, I may recal to your Lordships recollection the rule which has been established in this country, after some difficulty and some doubt, but which is now fully recognized, and which is the only rule by which questions of this sort can be determined with any thing like certainty, or any thing like justice to the parties. It frequently happens that what a testator contemplates does not take place; he intends land to be converted into money, or money to be converted into land, and he gives directions accordingly, and those directions are not acted upon; and after many years having passed, the question arises how the interests of the parties are to be arranged; not entirely according to the directions of the testator, because he has given no directions with respect to the state of circumstances that has arisen, but how the intentions of the testator are best to be carried out with regard to the state of circumstances which has arisen subsequently to his death; because of necessity the Court must adopt some course of arranging the interests of the parties. You cannot arrange them exactly as the testator intended, because the facts are different from what he contemplated. The Court is therefore under the necessity of adopting some course with reference to the intention of the testator, and with reference to what is just between the parties.

My Lords, I allude to the doctrine laid down in the case of Sitwell v. Bernard, in 6 Vesey, 520; and there are many other cases in which a similar difficulty has

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

occurred. In that case the testator intended that all the monies should be converted into land. That was the declared intention of the author of the trust disposition; and contemplating that to take place, and intending that to take place soon after his death, and intending to impose upon the parties claiming under his will a motive to stimulate them to carry his intentions into effect, he gave the whole of his estate in trust, and directed his income to accumulate till land should be purchased; he directed the money to be invested in land, and then gave a tenancy for life, with remainder over, in the land to be purchased. Many years elapsed, and no land was purchased; the property remained, as the testator had left it, in the shape of money, and the question arose what was to be done with it. It was quite contrary to the testator's declared intention that any party should derive any benefit from the fund so long as it remained in the shape of money; but the Court held, that as it had remained in the shape of money, and there had never been a conversion of it, it was necessary to adopt some middle course, in order not to defeat the obvious intention of the author of the gift, namely, that the tenant should derive some benefit; and the Court directed the accumulation to cease after the expiration of the first year after the death of the testator, considering that a reasonable time within which the intentions of the testator ought to be carried into effect, and directed the income of the fund so existing to be paid to the party who was tenant for life of the land; thus departing from the terms of the author of the gift, but doing that which, under all the circumstances, appeared to be most consistent with his intention..

Now in this case there is a direction to convert the

land into money; and when converted into money, after setting apart funds to meet the amount of the annuities of 400*l.* a year each, the surplus was in so many words given over to the legatees. Now it is obvious, that by not converting the land into money the chance which the testator contemplated, of the proceeds of the estate being more than was necessary to meet the annuities, and of there being therefore a fund applicable to the immediate payment of the residuary legatees, would not come into operation, because it could never be ascertained that there was any such fund, and therefore there could be no such claim enforced till after the sale took place, and therefore, to an extent, they were disappointed and postponed. Those who claimed the annuities had reason to be content, because it was immaterial to them whether the annuities came out of the land, or out of the money, provided there was sufficient. So long, therefore, as a sufficient income came out of the land, they received what it was intended they should receive. But when that income failed, and the produce of the estate was not sufficient to pay the annuities, they had the remedy in their own hands; they might then have insisted upon the execution of this trust, and upon the sale of the estates, in order that they might have the benefit of having a fund which probably would have produced more income in the shape of money than whilst it existed in the shape of land, in order to pay the annuities which the land was to pay. But they took no such step. They received the income of the land so far as it would go; they permitted the property to remain in the state in which the testator had left it, but which he had directed to be changed into another

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

form, for the purpose of securing the payment of the annuities.

The question therefore is, whether, independently of the particular terms of the gift to which I have adverted, if there had been more doubt upon those terms than in my opinion there is, the fair justice of the case between the parties would not be to act upon the rule established in Sitwell v. Bernard[1] and the other cases, that if the parties chose to permit the property to remain, contrary to the intention of the testator, in the state in which he left it, but which he had directed to be changed, they should take it for better or for worse in the situation in which they leave it, and are not entitled at a future time to pay themselves in full, to the prejudice of those who, if the property had been converted at the time the testator directed, might, at least, have had a chance of having a share in it, and who in all probability would at that time have had a share. Therefore, independently of the particular provisions of this deed, I should have thought that justice between the parties would have been, to let them receive such income as the land would produce until the period of conversion, and to give them no title as against either the future income of the fund, or as against the capital of the fund that has not been converted, for the purpose of paying the deficiency of the fund.

Your Lordships will permit me to call your attention to the extraordinary consequence of yielding to this claim. The first year after the death of the testator the land produced more than enough to pay the annuities.

---

[1] 6 Ves. 523.

Now, supposing there was 200*l.* more than enough to pay the annuities, the claim is that that surplus fund is to be held liable to make good the deficiency in any future year; now a deficiency might not occur for twenty or thirty years, the land might have been sufficient to keep down the annuities, and only just sufficient, or it might have produced more. Then was that accumulating income to be held de anno in annum by the trustees, because perchance twenty years hence the land might not produce sufficient to pay the annuities; and yet, according to the claim made by these annuitants, that would be the consequence. If they have a claim of lien to answer future deficiencies, the trustees would not then be warranted in paying it over to the legatees. In what a situation then would the legatees be? They are entitled immediately to receive the surplus of the fund beyond what is necessary to pay the annuities; but they would be prohibited from receiving the surplus beyond what is necessary to pay them; and the funds are to be retained during the continuance of the lives of the annuitants, in order to meet the possible chance, more or less remote, of the land not being sufficient to pay the annuities. It seems quite impossible that such a construction should be adopted, leading to such extravagant consequences. In point of fact there has been no one year in which a surplus has been found beyond the first two or three years; but that makes no difference in principle; it only shows how extravagant the proposition would be to consider the annuitants as entitled to the surplus of one year in order to meet the deficiencies of future years.

But when we come to see what it is that the testator has directed upon the face of this deed, it appears to me

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

that these considerations may be thrown out of view, because, as I construe this instrument, it is this: Upon the sale of the estate, if the funds were sufficient to secure the annuities of 400*l.*, an event which undoubtedly the testator contemplated, then there would be capital sums invested sufficient for that purpose, and then any surplus of the proceeds of the estate and those capital sums so invested, when made tangible, as the expression is, by the death of the annuitants, were to be paid over to the residuary legatees. But the testator had the prudence not to confine his view to that event only, because he contemplated the possibility of the proceeds of the sale of the estate not being sufficient to secure the whole amount of those annuities; and he then directs that in the event of there being no surplus, the whole of the proceeds of the sale, after paying the prior charges, shall be invested, be the amount what it may; and that the income arising from that fund, which is assumed to be inadequate to pay the amount of 400*l.* a year each to the sisters, shall be divided between the sisters, and in the same proportion in which they would be entitled to the full income, provided it had been sufficient to pay the annuities; and then, upon the death of each of the annuitants, either the whole fund which shall have produced sufficient to pay the 400*l.*, or the amount of the fund whatever it might be, should in that event be paid over to the residuary legatees.

Now if that be the construction of the deed, then it excludes all the other questions, because the event then has happened: a deficient fund exists, not sufficient to pay the whole of the annuities. Upon the death of one of the annuitants, that portion of the fund which was set apart to answer that annuity is to go over to the

residuary legatees; then what claim can the surviving annuitant have against the income of the other moiety to keep down the annuity which had fallen into arrear? It is quite obvious that there cannot be both claims. If it is liable to keep down the deficiency of the fund to pay the annuity, then it cannot go over to the residuary legatees. If then the construction of this instrument be, that supposing the fund be inadequate to the payment of the annuities, yet upon the death of one of the annuitants the capital of the fund is to go over to the residuary legatees, then all claim of the surviving annuitant to that released portion of the fund must necessarily fail, according to the construction I put upon this deed. It is also free from the argument which was pressed at the bar, and which seems to have been rather assumed in the Court below, namely, that in the event of the fund being sufficient, it was not to be divided into different investments to answer the different annuities, but was to remain in one fund, and the annuities to be charged upon that gross fund. Now, if the testator has directed that, upon the supposition of the fund not being sufficient upon the death of one of the annuitants, the fund answerable to that annuity shall go over, it is not very material whether the fund was to remain as one aggregate fund, or whether the fund was to be divided; though undoubtedly the intention would be more manifest if it appeared upon the face of the instrument that the fund, even in that case, was to be divided, and to be set apart to answer the annuities of the remaining annuitants. According to the construction I put upon this instrument, however, he has directed, in case of deficiency, the fund itself to be appropriated according to the shares and proportions to

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

L.d. Chancellor's Speech.

which the annuitants would have been entitled had there been a sufficient fund. The case is the same—there is no difference in the result—as if he had directed that the share—whether a divided share or an undivided share—applicable to the annuity of one of the sisters, was to go over, in the event of the death of that sister, to the residuary legatee, and not to be a fund to make good the annuity of the surviving annuitant, to the extent of forming a fund which might be adequate to the purpose.

Now before the particular words are considered, there is another part of the instrument only necessary to be adverted to, for the purpose of showing how much it was in the contemplation of the author of the deed that the property might not be found adequate or nearly adequate to pay those annuities of 400*l.* a year and the legacies. He directs, in a subsequent part of the deed, that two legacies of 1,000*l.* each should be paid, according to the construction of this instrument, in priority to the application of the funds to secure the annuities; that is to say, if the residue amounts to a certain sum (15,000*l.*), then the two legatees were to have 1,000*l.* each; but if the residue was under 15,000*l.* and not less than 8,000*l.* then they were to have 500*l.* each. He contemplated, therefore, the possibility of that event, and he also contemplated that there might be less than 8,000*l.*, and then they were to have no legacy at all. Now I will suppose that it was exactly 8,000*l.*; if it came exactly to 8,000*l.* then the two legatees were to have 500*l.* each; they therefore were to have 1,000*l.* out of the 8,000*l.*, 7,000*l.* remaining to answer annuities of 1,000*l.* a year. It is quite clear, for it runs through the whole instrument, that he contemplated not only the

case of there not being enough to pay the 1,000*l.*, but of there being a fund very inadequate indeed to meet those charges. With that present to his mind, and guarding against both alternatives, he makes this provision: he directs the property to be sold, and further, "in the "event that after payment of my debts, fulfilment of "the obligations in which I may stand bound at the "time of my death, payment of the expenses attendant "on the execution hereof, and of the 500*l.* to my said "sister Mrs. Alexander, the residue of the proceeds of "my funds and estate shall not be sufficient for yielding "the foresaid annuities hereby settled on my said "sister," (he had before provided for there being sufficient, he now provides for there not being sufficient,) "then it is my meaning and intention that the residue, "whatever it may be, shall be vested and laid out, and "the interests or dividends arising therefrom be paid "unto and divided among my three sisters, Mrs. Foth-"ringham, Mrs. Paterson, and Mrs. Buchanan, during "their respective lives, in the same proportions, and "exactly in the same terms in every respect as above "pointed out with respect to the full annuities of 400*l.*, "400*l.*, and 200*l.*"

Now here he directs not merely that the annuities shall be paid in those proportions, but he directs that in case of a deficiency the residue shall be invested, and the income paid in the same proportions and exactly in the same terms. How is that direction to be complied with? Why, if there were but two (as the annuities were equal) sums to be invested, and equal annuities to be paid, whether the sum amounted to only 2,000*l.* or to what was sufficient to pay the annuities of 400*l.* a year, was perfectly immaterial. Whatever it was the sisters

CASAMAJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

were to share it equally between themselves. The intentions of the testator and his directions were applicable to the one case as well as to the other, the only difference being that the income of the sisters would depend upon the amount of the fund. In no other respect were the directions of the testator to be varied by the circumstance of the estate producing more or less money. That is the principal direction, and then he goes on: "And I do hereby direct my trustees to regu- "late themselves accordingly."

Then comes the fifth provision which gives the fund over: "In the event of there being any of the pro- "ceeds in my said funds and estate remaining, after "setting apart capital sums sufficient to yield the three "annuities of 400*l.*, 400*l.*, and 200*l.*, as above spe- "cified, then I hereby direct my said trustees to pay "such surplus, together with the capital sums so to be "set apart for answering the foresaid annuities, as and "when such capital sums become tangible by the "deaths of the said annuitants respectively." Here, so far he has provided for the event of the capital being sufficient to meet the annuities, and he has directed what is to be done with the surplus, if any, together with the capital sums invested, when they become tangible by the death of the annuitants. Now he is about to provide for the other contingency of the fund being inadequate for this purpose: "or, in the event of there "being no surplus, then the capital sums, whatever their "amount may be, so to be vested and laid out as afore- "said, as and when such capital sums become tangible "as aforesaid." Then what is the second alternative? He has presented us with two alternatives. In the early part of the instrument he has directed the investment

of capital sums sufficient to answer the purpose of the annuities; and if there be not sufficient, he has directed an investment of the residue, whatever it may be, to answer the annuities, pro tanto. Then, in the gift over, he says, "If there be a surplus, the surplus, "together with the capital sums so invested, when "become tangible by the death of the annuitants, is to "go over, or, in the other event of the funds invested "not being sufficient to pay the annuities, then the "capital sums become tangible by the death of the "annuitants are to go over."

That is precisely what has happened, although the property has not been sold and the money not invested. It has been hitherto an inadequate fund; and it cannot be contended, that if the estate had been sold, and had produced a fund inadequate to pay the annuities in full, that if in that event the residuary legatees had been entitled to one half of the residuary fund on the death of one of the sisters, they would not be entitled to one half of the fund when it is not converted into money. If that could not be contended, in the event of the fund being invested, it is quite clear that it could not be contended in the present circumstances of the fund not being invested. If the right construction of the sentence be, that, in the event of the fund being deficient, there nevertheless shall be an investment of the fund, whatever it may be, to answer the annuities pro tanto, then the whole is intelligible. But if that be not the right construction, it is not very easy to understand or to decide the meaning of the terms of the instrument. But how does that affect the claims of the annuitants? The fund is answerable to pay the annuities equally. Each annuitant, therefore, is entitled to

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

Ld. Chancellor's Speech.

an half, whether it exists as one fund or whether it is divided. It is difficult to see how that can affect the claim of either of the annuitants to receive out of the future income of the other what shall remain unsatisfied by the produce of the estate. Whether the one construction or the other be correct, I apprehend that the testator has sufficiently declared that the parties, if they cannot get the whole amount of the annuities, must take the income which the fund will produce, whatever it may be; and that, upon the death of one of the annuitants, the fund which thus becomes tangible shall go over to the legatees; and with that declaration your Lordships will probably think it right to vary the interlocutor which has been appealed from. The better way will be to declare that to be the construction which your Lordships put upon this instrument, and to refer it back to the Court of Session to apply that to the interlocutor to be pronounced.

This case presents some difficulty. In the first place, with regard to the interlocutor of the Lord Ordinary, which is left untouched by the Court, except so far as it is altered with regard to Mrs. Paterson's claim to future arrears of the annuity, I am not quite sure that I entirely follow the provisions of that interlocutor. The expressions are not sufficiently distinct to enable me to understand how far the learned judge intended to go; for instance, the second finding finds, "that the full security and payment of these annuities "constituted a primary and preferable burden on the "whole residue of the trust funds and estate, after "deducting the sums necessary for paying and satisfying the testator's debts and obligations, the expenses "of the trust, the legacy of 500*l.* to Mrs. Alexander,

"and the two legacies of 1,000*l.* each payable to "George and Thomas Patersons." That is perfectly correct, according to my view of the case, if it is confined to each year; but it appears to me impossible, from the language used, to ascertain whether the learned judge meant to confine it to each year, or whether he meant to say that the fund is answerable during the whole continuance of the trust to make good those annuities. If that be the meaning, then I differ from the learned judge.

[*Mr. Attorney General.*—My Lords, if I may humbly suggest, it would be very important that your Lordships should make an express declaration in your order upon that subject.]

Lord Chancellor.—It will be quite explicit if the House declare the true construction of the instrument to be: that although the income was inadequate to pay the annuities, upon the death of one of the annuitants one half of the fund went over to the residuary legatees; and it precludes the possibility of the income of that fund being applicable to any other purpose.

[*Lord Advocate.*—Also to find (which was not done) that Mrs. Paterson, the surviving annuitant, is entitled only to the income of one half of the fund from the death of Mrs. Fothringham.]

[*Mr. Attorney General.*—That would follow.]

Lord Chancellor.—The Lord Ordinary thought that neither of them took it. When it came before the Court, they were of opinion that Mrs. Paterson was entitled to payment of the whole arrears of the annuity due to her. But it appears to me that it will be quite free from all doubt, if the House declare that during the continuance of the trust, the annuitants

CASAMAIJOR and others v. PEARSON and others.

29th Apr. 1841.

can only divide the income of the estate as far as it will go, and that upon the death of one of them the share which was invested to secure the payment of that annuity went over to the residuary legatees. That would exclude all the other questions; and I think the better way will be to make these declarations, and then to refer it back to the Court of Session to apply them.

Judgment.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said appeal be and the same are hereby reversed and altered, to the extent necessary to give full effect to the following declaration; viz. that it is declared, that Mrs. Fothringham and Mrs. Paterson were entitled to payment of their annuities of 400*l.* each, only so far as the free annual proceeds of the trust fund, during the year for which such annuities were payable, were sufficient for the payment thereof; but that when in any one year the free proceeds exceeded in amount the said two annuities of 400*l.* each, such excess belongs to and became divisible among the residuary legatees; and that upon the death of Mrs. Fothringham, one half of the capital of the trust fund became divisible among the residuary legatees; and that from the death of Mrs. Fothringham, Mrs. Paterson is entitled to the free income in each year of only one half of the capital of the trust fund; but in any one year when such free income exceeds 400*l.*, such excess shall belong to the residuary legatees: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment.

RICHARDSON and CONNELL — SIMPSON and COBB, Solicitors.

[*3d May* 1841.]

Lieutenant Colonel JOHN GORDON of Cluny, Appellant.[1] (No. 8.)

[*Sir W. Follett — James Anderson.*]

JOHN GRAHAM and JAMES GRAHAM, Respondents.

[*Lord Advocate (Rutherfurd) — Biggs Andrews.*]

Bill of Exceptions — Landlord and Tenant — Sequestration — Assignation. — (1.) At the trial of an issue,—Whether the defender wrongfully failed to relieve the pursuers crop and stock from sequestration, by which it was then attached? — the Judge directed the jury in point of law, that "the tenders of the arrears of rent having been made by "the pursuers agent, in terms of his letters of the 18th "and 24th of May 1838, and the sequestration not having "been withdrawn until the 28th of that month, the said "sequestration ought to have been withdrawn after these "offers, and more especially after that of the 24th of "May; and that the defender was in law responsible to "the pursuers for not withdrawing the sequestration, "quoad the sums contained in these tenders." The defender excepted to this direction: The Court of Session, without concurring in the opinion in point of law so stated to the jury, disallowed the bill of exceptions on the ground that, in the special circumstances of the case, the direction was right. Judgment of the Court of Session, disallowing the bill of exceptions, reversed, and cause remitted back, to allow the bill of exceptions and grant a new trial.

(2.) Per LORD CHANCELLOR.—The only matter raised by the exception was the abstract question of law, and the Court

[1] Fac. Coll., 2d and 9th Feb. 1841.

could not travel out of the exception. The circumstances were exclusively for the consideration of the jury.

(3.) Question raised,—Whether a landlord is bound to assign to the agent of his tenant, whose crop was under sequestration, his right of hypothec, on the agent tendering payment of the rent?

1st Division.

Jury Cause.

Judge at Trial, The Lord President.

Statement.

THE appellant let part of his lands in Mid Lothian to the respondents upon a nineteen years tack, the entry being at November 1832. The lease contained a stipulation as to the houses and fences being put in a tenantable condition by the appellant.

At 12th August 1837 certain arrears of rent were due by the respondents, to secure payment of which, and of the rent from Martinmas 1836 to Martinmas 1837, payable at Candlemas and Lammas 1838, the appellant then applied to the sheriff for sequestration of the respondents crop and stock. Sequestration was awarded.

Some correspondence afterwards took place betwixt the parties and their agents, and among others a letter, dated 28th August 1837, was written by Mr. John Gray, the appellant's agent, to Mr. Maurice Lothian, the agent for the respondents, in these terms:—"Captain "Duguid, factor for Colonel Gordon, came to town "from Aberdeenshire on Saturday night, and he is now "with me. Captain Duguid does not approve of your "proposal on the part of Messrs. Grahams, and he "cannot consent to the sale going on as advertised; "but he is quite willing to accept of your guarantee to "pay the arrears of rent, on caution being also found "to pay the current year's rent when due, and Colonel "Gordon is quite willing to grant an assignation to the "act of sequestration, either to you or to any other

" person who pays the rent and finds caution, and then " the roup may proceed. I shall expect your answer " in the course of to-day, as Captain Duguid proposes " to leave town this evening."

Payments to account of the rent were soon after made.

On the 14th May 1838 the Sheriff, upon the application of the appellant, granted warrant to sell sufficient to pay a balance of rent due at Candlemas preceding; and on the 16th an advertisement was issued of a sale of the respondents effects, to take place on the 23d May 1838. Upon the 18th May 1838, Mr. Lothian wrote to Mr. Gray in these terms:—" Dear Sir,—Stop the " roup in Gordon v. Grahams; and, since we can't do " better, I will advance the arrears and expenses myself, " on your client granting an assignation, or giving me " an obligation to grant one at my expense. My as- " signation not to compete with the landlord's right for " the balance of the year's rent, of which the above " arrears form a part. Yours, &c."

Mr. Gray answered the above on the 23d, thus: — " I mentioned to you that I had sent a copy of the state " and expenses which I handed you to Colonel Gordon; " and on calling upon him, he stated that there was a " larger balance of rent due than was contained in the " state; for that by the lease the tenants had become " bound to pay 6*l.* per acre for each acre they cropped " on the farm different from the stipulations in the " lease, and that the tenants had miscropped several " acres in the year 1837, as could be shown by a " measurement of Mr. Knox; and the tenants were " bound by the lease to pay 6*l.* per acre of additional " rent for each of these acres; and that he also looked " to the tenants for payment of all the extrajudicial ex-

GORDON v. GRAHAM and another.

3d May 1841.

Statement.

" pense incurred by them, and of which I handed you " a copy.

" I wrote Colonel Gordon that I would make a " demand upon you for the additional rent, and for " payment of the extrajudicial expenses; and if refused, " that it appeared to me necessary to present a supple- " mentary petition of sequestration to the sheriff for " the foresaid additional rent, in terms of the lease, and " also to claim the extrajudicial expenses from your " clients. They have a double of the lease, which you " can get from them. In the meanwhile, I annex a " copy of the clause in the lease regarding the additional " rent. I shall be glad to hear from you in answer."

On the 24th May 1838 Mr. Lothian wrote to Mr. Gray thus:—" I have received your extraordinary " letter of yesterday, and sent it to Messrs. Graham for " information to answer it. In the meantime I have " tendered you the whole money for which you have " taken warrant to roup, and you declined it, only " taking my obligation to pay it. I have now to repeat " that I am ready to pay that money to you, or your " client Lieutenant Colonel Gordon, on a receipt " acknowledging that the money is paid by me, and " binding your client to grant to me, at my expense, an " assignation in the terms mentioned in my said obliga- " tion, of which (as I wrote it in your chambers) I have " no copy. I will thank you to send me a copy of it. " I have only to add, that if the money above referred " to be not accepted by you, I will lodge a minute in " my own name in the existing process of sequestration, " and consign the money with the Clerk of Court at " your client's expense."

Upon the 28th May 1838 the appellant accepted

payment of the balance of rent and interest tendered, and granted a receipt in these terms:—"Edinburgh, "28th May 1838.—Received from Maurice Lothian, "Esquire, solicitor, 64*l.* 10*s.* 3*d.*, with 1*l.* 0*s.* 3*d.* of "interest thereon, being the balance of rent of the farm "of Egypt, payable at Candlemas last, and interest "thereon, for which a warrant to roup was taken "against Messrs. Graham, the tenants, in a process of "sequestration at my instance, reserving any further "claims competent to me for additional rent on account "of part of the lands, being, as I am informed, cropped "differently from the stipulations of the lease, and for "all expenses incurred by me in regard to the recovery "of the rents for which said sequestration was used, "and reserving to the tenants their defences against "such claims; and I engage to grant to Mr. Lothian, "at his expense, an assignation of said sums now paid "to me, and of the proceedings at my instance under "the said sequestration, to the end he may operate his "payment from Messrs. Graham, but so as not to com-"pete with any claims competent to me as landlord.

"(Signed) JOHN GORDON."

On the 31st May 1838 the respondents raised an action of damages against the appellant, founding on his alleged failure to implement a condition in the lease as to putting the houses and fences in proper repair, as well as on the proceedings in the sequestration, and concluding, among other things, for 500*l.* as damages for the loss they had sustained from the conduct of the appellant, "and from his having refused or delayed to "perform the obligations incumbent upon him, and "in consequence of the oppressive and unjustifiable "measures adopted by him."

Gordon v. Graham and another.

3d May 1841.

Statement.

The parties went to trial on the following issues:—
" It being admitted that under the lease, of which
" No. 3. of process is a copy, the pursuers became
" tenants of the farm of Egypt, the property of the
" defender, for the period of 19 years, from the 22d day
" of November 1832:

" Whether the defender wrongfully failed to put the
" houses and fences on said farm in tenantable and
" fencible condition, in terms of the said lease, to the
" loss, injury, and damage of the pursuers?

" Whether, on or about the 12th day of August 1837,
" the defender obtained from the sheriff of Edinburgh
" a sequestration of all or any part of the crop and
" stock of the pursuers on the said farm; and whether,
" on or about the 23d of May 1838, the defender
" wrongfully failed to relieve the pursuers said crop
" and stock from the said sequestration, to the loss,
" injury, and damage of the pursuers?"

The following verdict was returned:—" At Edin-
" burgh, the 13th day of July, 1840 years, before the
" Right Honourable the Lord President, compeared the
" said pursuers and the said defender, by their respec-
" tive counsel and agents, and a jury having been
" impannelled and sworn to try the said issues be-
" tween the said parties, say, upon their oath, that in
" respect of the matters proven before them, they find
" for the pursuers on both issues, and assess the da-
" mages at 475*l.*"

The following exceptions were taken by the counsel for the appellant to the direction of the Lord President at the trial:

" First exception.—That thereafter the said Lord
" President, in addressing the jury, declined and

3d May 1841.

Statement.

" omitted to direct the jury, in point of law, that the " obligation on the landlord, in the clause of the lease " referred to in said issue, to put the houses and " buildings in tenantable condition, did not require " to be implemented within the same time as the " obligation as to the fences.

" Second exception.—And that the said Lord Pre- " sident did direct the said jury, in point of law, as to " the second issue, that tenders of the arrears of rent " having been made by Mr. Maurice Lothian, in terms " of his letters of the 18th and 24th of May 1838; and " the sequestration not having been withdrawn until the " 28th of that month, the said sequestration ought to " have been withdrawn after these offers, and more " especially after that of the 24th of May; and that the " defender was in law responsible to the pursuer for " not withdrawing the sequestration, quoad the sums " contained in these tenders."

The bill of exceptions having been discussed before the judges of the First Division, their Lordships pronounced the following interlocutors:

Judgment of Court, 2d Feb. 1841.

" The Lords having heard counsel for the parties, " disallow this bill of exceptions; find the defender " liable to the pursuers in the expenses incurred by " them in the discussion on the bill of exceptions, and " remit to the auditor to tax the account thereof, and " to report.

Judgment of Court, 9th Feb. 1841.

" The Lords apply the verdict of the jury, and de- " cern ad interim for the sum of 475*l.* found due by " the jury; further find the pursuers entitled to the " expenses of the jury trial, remit to the auditor to tax " the same and to report; and remit the case to the

GORDON v. GRAHAM and another.

"Lord Ordinary, to dispose of the other conclusions of "the libel."

3d May 1841.

The defender appealed.

Appellant's Argument.

Appellant.—Of the two exceptions, it would be sufficient, for the present, to consider the one applicable to the second issue.

Instead of submitting to the jury the question of fact, whether the appellant had wrongfully failed to relieve the respondents of the sequestration, the judge had directed the jury, in point of law, that the appellant was bound, after the two letters of the 18th and 24th May, to withdraw the sequestration. Now, in the first place, the obligation to withdraw the sequestration was not raised by the terms of the issue; and the effect of the misdirection cannot be got over, as proposed by the Court[1], by assuming that the jury understood the term "withdraw" to mean in this instance the same as "relieve." Such a mode of supporting a direction had been shown to be wrong, by the reversal, in this House, in the Cromarty case (Horne v. M'Kenzie[2]), where the Court were satisfied, upon the explanation of the presiding judge, that the term "prevalence" used by him to the jury was meant as equivalent to "predominance." But, secondly, the sequestration was not withdrawn on the 28th; it still subsisted for the then current term's rent. Further, the landlord was not required by Mr. Lothian, in the two letters referred to, to "withdraw" the sequestration;

[1] See Lord Mackenzie's opinion in rep. in Fac. Coll.

[2] M'L. & Rob. App. 977.

Appellant's Argument.

and although he had, he was not bound to do so, without having the current term's rent provided for. Whether the landlord was bound to assign his right of hypothec and sequestration was a question not raised by the issue or direction; and although it had, the landlord would not have been so bound.[1] And so the Court held; for their Lordships declined concurring in the general proposition in law assumed to have been laid down by the Lord President, Lord Mackenzie stating that he doubted, as a general proposition, whether a landlord is bound to grant an assignation even to the agent of the tenant, and that it was unnecessary to decide that point, "as there are specialties in this "case sufficient to show that the direction was well "founded;" and Lord Fullerton reserved his opinion on the general point, but thought the direction might be supported on the special circumstances of the case. Thus the direction was made to rest on grounds differing from the ground submitted to the jury, and this of itself was fatal to the direction. Further, even if "relieve" had been the word used, there was no evidence that the appellant was bound to relieve from the sequestration. He was merely asked to stop the roup, which was done; and there was a tender of rent, on granting an assignation to a third party, which the appellant was not bound to do.

Respondents Argument.

Respondents.—This exception proceeds upon the most hypercritical construction of a very obvious direction upon a simple enough point. The Lord President

[1] Tod v. Montgomerie, 10th February 1743, Mor. 6,228; Kilk. 273; Hunter, on Landlord and Tenant, 701.

GORDON v. GRAHAM and another.

3d May 1841.

Respondents Argument.

laid down no abstract proposition in law, and none such was necessary to be stated. The law stated was the law of this particular case as arising out of the documentary evidence and admitted facts laid before the jury. Among other evidence before them was Gray's letter of the 28th August 1837, which contained a distinct undertaking by the appellant to grant an assignation upon Lothian paying the rent; and tenders of the rent on these terms are afterwards made—at first refused and delayed to be accepted—but finally accepted by the appellant. Thus the sequestration had for days been continued, after it might have been taken off, to the extent and in the way in which it was on the 28th. In the plain and obvious meaning in which the judge used and the jury understood the term, the sequestration was on the 28th, to a certain extent, withdrawn, and so the crop and stock relieved, after some days wrongful delay. Thus the case was not sent to the jury upon the two letters alone of the 18th and 24th May; and no part of the evidence was withheld from their consideration. The Court accordingly, in holding the direction to be right upon the special circumstances, never conceived that any part of the case had been withdrawn from the province of the jury. The Court went on the facts.

[*Lord Chancellor.*—But suppose so; should it not have been a question for the jury, whether the landlord was bound or had come under an obligation to relieve? The letter of 28th August is not founded on by the Lord President.] All this was before the jury, upon the facts proved in evidence or admitted.

[*Lord Chancellor.*—The jury could not so understand it; certainly I do not so understand it. There is no

GORDON v. GRAHAM and another.

3d May 1841.

contract in evidence, and it was not so put. Then upon the law it does not seem that the landlord is bound to assign his sequestration.]

The Lord Advocate prayed the judgment of the House as to the first exception.

Respondents Argument.

Lord Chancellor. — Sir William Follett, have you any thing to address to the House upon the first exception? The House will not call for any reply upon the second exception.

Sir William Follett. —The appellant has no interest in having a judgment on the first exception. The verdict being erroneous in respect of the misdirection on the second issue, the judgment appealed against must be entirely reversed, and there must be a new trial on both issues.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case is comprised within a very small compass. The respondents were tenants of the appellant under a lease. The rent having fallen into arrear, the appellant applied to the sheriff, and obtained a sequestration of the crop and stocking on the farm. On the 18th of May 1838 Mr. Lothian, the agent for the respondents, wrote this letter to Mr. Gray, the agent for the appellant: "Stop "the roup in Gordon v. Grahams; and, since we can't "do better, I will advance the arrears and expenses "myself, on your client granting me an assignation, or "giving me an obligation to grant one at my expense. "My assignation not to compete with the landlord's "right for the balance of the year's rent, of which the "above arrears form a part." The meaning of this proposal is, not that the tenants should pay the rent, but that Lothian, the agent, should pay the amount of the

GORDON v. GRAHAM and another.

3d May 1841.

Ld. Chancellor's Speech.

rent due, and take an assignment of the sequestration for his own security. This offer was not accepted; for, on the 23d of May, the landlord's agent wrote a letter declining to accept it. The reasons for this refusal are immaterial to the disposal of the question before your Lordships, as presented by the bill of exceptions.

Then comes this letter of the 24th of May, from Mr. Lothian to Mr. Gray: "I have received your "extraordinary letter of yesterday, and sent it to "Messrs. Graham for information to answer it. In "the meantime I have tendered you the whole money "for which you have taken warrant to roup, and "you declined it, only taking my obligation to pay "it. I have now to repeat I am ready to pay that "money to you, or your client Lieutenant Colonel "Gordon, on a receipt acknowledging that the money "is paid by me, and binding your client to grant "to me, at my expense, an assignation in the terms "mentioned in my said obligation, of which, as I "wrote it in your chambers, I have no copy. I will "thank you to send me a copy of it. I have only to "add, that if the money above referred to be not "accepted by you, I will lodge a minute in my own "name in the existing process of sequestration, and "consign the money with the Clerk of Court at your "client's expense." It does not appear that any answer was written to this letter, but an arrangement seems to have been made by the 28th of May, on which day the money was paid, and a receipt granted by Colonel Gordon (in the terms quoted) containing an obligation to assign the sequestration to a certain effect.

This having become the subject of a suit in the

Court of Session by the tenants against the landlord, complaining that they ought to be relieved from the effect of the sequestration, and raising another question, which it is not necessary now to discuss, as to the repairs, the Court of Session directed two issues. The issue applicable to the exception now under consideration was, "Whether, on or about the 12th day of "August 1837, the defender obtained from the sheriff "of Edinburgh a sequestration of all or any part of "the crop and stock of the pursuers on the said farm; "and whether, on or about the 23d of May 1838, the "defender wrongfully failed to relieve the pursuers "said crop and stock from the said sequestration, to "the loss, injury, and damage of the pursuers." One would suppose, from reading this issue, that the case set up was that, on the 23d of May, the appellant was under an obligation to relieve the respondents from the effect of the sequestration.

On the trial of the issues the Lord President, who presided at the trial (as it appears from the second exception), directed the jury in these terms: "The "Lord President did direct the said jury, in point of "law, as to the second issue, that tenders of the "arrears of rent having been made by Mr. Maurice "Lothian, in terms of his letters of the 18th and "24th of May 1838, and the sequestration not having "been withdrawn until the 28th of that month, the "said sequestration ought to have been withdrawn "after these offers, and more especially after that of "the 24th of May; and that the defender was, in law, "responsible to the pursuer for not withdrawing the "sequestration, quoad the sums contained in these "tenders."

GORDON v. GRAHAM and another.

3d May 1841.

Ld. Chancellor's Speech.

No one can mistake the effect of his language. It contains a distinct exposition of that which is intended to be laid down by the Lord President, in point of law, that the tender contained in the two letters of the 18th and 24th of May imposed an obligation in law on the landlord to withdraw the sequestration; that the landlord, having a sequestration against the tenants, on any one saying, "I will pay the arrears of rent, "provided you will grant to me an assignation of the "sequestration," the landlord was bound, by the law of Scotland, to accept that offer. If that be so, the opinion expressed by the learned judge who presided would be correct; but if otherwise, it would be exceptionable. It does not appear to me that the language of the letter is open to any ambiguity or doubt, but that it proceeds to express the only terms on which the agent of the respondent, Mr. Lothian, required the sequestration to be withdrawn; there was no payment of rent quà rent, but an offer to pay the same sum on the sequestration being assigned. Whether the word "withdraw" had a different meaning from the word "relieve" is immaterial, with reference to the opinion delivered to the jury by the learned judge, for the bill of exceptions must stand or fall by the legal effect of that which was laid down at the trial. It will not do to support the direction of the learned judge on other grounds or other facts, for the learned judge tells the jury that the effect of those two letters amounts in law to an obligation on the landlord to comply with this requirement of the letters.

But when the bill of exceptions came on for discussion in the Court of Session, that Court does not profess to support the law as propounded in the Lord President's

opinion; the judges do not say that it is right, or that it is wrong, but they find in other parts of the case, and in the evidence before the jury, and on a consideration of the whole of the merits of the case on which the jury have come to a decision, grounds for supporting the opinion so delivered by the learned Judge. Lord Mackenzie, followed by Lord Gillies and Lord Fullerton, founded their opinions, not on those two letters which were the foundation of the Lord President's opinion delivered to the jury, but they begin with the letter of the 28th of August 1837, which the learned Judge who presided at the trial had not in the slightest degree adverted to. It is unnecessary therefore to look at that letter to see what it contained, or whether it could amount to a contract to be carried into effect in 1838, with reference to the then state of the case. That letter does not appear to have been alluded to in the summing up, the learned Judge does not put it upon that; and the question is, whether the law he lays down to the jury is correct, — not whether the conclusion might be ultimately the same or not, but whether that which he lays down in stating the grounds of his opinion is correct in point of law. I do not find that the learned Judges express any opinion in favour of that which was laid down, which induces me to look further to see whether it can be so supported. The matter of fact appears to have been withdrawn entirely from the consideration of the jury, they having been told by the learned Judge, that in point of law, after receiving those two letters, the landlord was bound to withdraw the sequestration, or to relieve the tenants from the effect of it; and if that was correct, the jury had nothing to do but to assess

GORDON v. GRAHAM and another.

3d May 1841.

Ld. Chancellor's Speech.

the damages. They were told that these letters had raised that responsibility, when, in my opinion, there was nothing in these letters to raise that liability. There appears evidently to have been a mistake; the matter is not disposed of by the Court upon the grounds on which it is put by the learned Judge, that those two letters so promulgated to the jury amounted to an obligation, resting on those two letters alone, binding the landlord to withdraw the sequestration, or to relieve the tenants from the effect of it. In consequence it appears to me, that the interlocutors must be reversed, and the bill of exceptions allowed; and the case must be sent back to the Court of Session to do that which is just.

Judgment.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is declared, That the bill of exceptions ought to be allowed in respect of the second exception stated therein: And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed further therein as shall be just and consistent with this declaration, direction, and judgment.

BRUNDRETT, RANDALL, SIMMONS, and BROWN — G. & T. WEBSTER, Solicitors.

[*4th May* 1841.] (No. 9.)

JOHN HUTCHINSON FERGUSSON, Appellant.[1]

[*Pemberton — Fitzroy Kelly.*]

DAVID FYFFE and others, Respondents.

[*Sir W. Follett — Griffith Richards — H. J. Robertson.*]

Account — Interest, Accumulation of — Foreign. — A party resident in India opened an account with a mercantile company, as his agents, at Calcutta in 1786; the party was non compos mentis in 1793, and continued so till his death in 1810. In 1812 a partner of the company, then in Great Britain, rendered to a relative of the deceased party an account embracing a long term of years, and balanced annually on the 30th of April, down to the 30th of April 1810. The company at the close of each year debited themselves with Indian interest, and carried forward the balance, composed of principal and interest (under deduction of one per cent. for commission), as one sum, bearing Indian interest, in the next year; the balance thereby exhibited against the company was 17,346 sicca rupees; a docquet was subjoined, to the effect that the balance was to bear interest at nine per cent.; a letter from the said partner accompanied the account, and acknowledged the above balance. No representation was taken out to the party's estate till 1835, but in 1833 certain parties, as his alleged representatives, raised an action in the Court of Session for the amount of the account rendered, with interest at nine per cent., and in 1835 raised a supplementary action, concluding for compound interest on the account rendered, against a partner

[1] 16 D., B., & M., 1038; Fac. Coll.

of the company resident in Scotland, and who had in 1820 retired from the company, which had since been dissolved: Held (affirming the judgment of the Court of Session), (1.) That the defender was bound by the account so rendered, and was liable for the amount of the sums therein charged: (2.) That he was chargeable also with interest on the said amount at the rate of nine per cent. per annum from the 30th of April 1810 to the date of the final decree to be made in the action: But Held (3.) (reversing the judgment of the Court of Session), that, in calculating interest on the said amount, compound interest or annual rests ought not to be allowed.

1st Division.

Lord Ordinary Fullerton.

Statement.

THE late Dr. Charles Fyffe, who resided in Calcutta, opened an account, in 1786, with the company of Fergusson and Fairlie, afterwards Fairlie, Reid, and Co., of Calcutta. In 1793 Dr. Fyffe was affected with insanity, the precise date of the commencement of the illness not being known. The account was balanced annually on 30th April; and in 1793 the balance in his favour, in account with the company, was 4,207 sicca rupees. No operations were afterwards had on the account by Dr. Fyffe, or any one on his behalf. On 1st May 1793 the appellant became a partner of the company. On 30th April 1795 one of the partners withdrew, another partner was assumed, and the business was carried on by the new company under the firm of Fairlie, Gilmore, and Co. On 30th April 1810 another change of some of the partners took place, and the new company carried on the business under the firm of Fairlie, Fergusson, and Co. till 30th April 1818, when a similar change occurred, and the new firm was Fergusson, Clark, and Co., which continued till 30th April 1820. At that date the appellant, who had been

a partner of all the firms since 1793, retired, and the business was subsequently carried on under the firm of Fergusson and Co.

Dr. Fyffe died on 9th May 1810. In 1812 James Fyffe, residing in Glasgow, his near relation, applied to the late William Fairlie, one of the partners of Fairlie, Fergusson, and Co., and of the previous firms, for a state of the account of Dr. Fyffe with the company. James Fyffe alleged that he received an answer, dated 23d March 1812, stating, "I beg that you will "inform the relations of Mr. Charles Fyffe, that the "balance of his account with Messrs. Fairlie, Fergus-"son, and Company, upon the 30th of April 1810, was "sicca rupees, 17,346. 5. They will continue to advise "me how this balance may stand with them. The "interest of money has fallen greatly in Bengal, and "seven per cent. is now the highest rate which is "allowed." This letter was not produced, and the appellant did not admit it. On 5th July 1812 Fairlie furnished a state of the account of Dr. Fyffe, which had been obtained from India, and was made up from the company's books. He at the same time wrote to James Fyffe, "I now enclose you Mr. Charles Fyffe's account "from its commencement, which I received some time "ago from Calcutta; the balance, on the 30th April "1810, was rupees, 17,346. 5., chiefly arising, you will "observe, from the high rate of interest allowed upon "it." It did not appear that the death of Dr. Fyffe was at this time known to any of the parties.

The account commenced in 1786, and was stated on the footing of annually accumulating the interest with the principal, and carrying forward the joint amount, as a capital bearing interest, in next year's account.

FERGUSSON v. FYFFE and others.

4th May 1841.

Statement.

This was done under deduction of one per cent. per annum, in name of commission. The same mode of making up the account was continued after the period of Dr. Fyffe's insanity as before it; but the whole details of the account came then to consist merely of an annual accumulation of interest with principal, as no operations were made on it by any party for Dr. Fyffe. The rate of interest, for several years after the period of Dr. Fyffe's insanity, was nine per cent., but from 1799 till the last entry of the account, in 1810, the rate was ten per cent. The account stopped at 30th April 1810. The account bore a docquet in these terms: "To balance in "his favour with Fairlie, Fergusson, and Company, to "bear interest at nine per cent. per annum, sicca "rupees 17,346. 5." The whole was signed by the firm of Fairlie, Fergusson, and Company.

In 1833 the respondents, David Fyffe of Smithfield and Mrs. Fyffe or Kerr, who were afterwards decerned executors dative qua next of kin of the deceased Dr. Fyffe, and alleged they were also interested under a holograph will left by him, raised an action, in the Court of Session, against John Hutchinson Fergusson, the appellant, as a partner of the firm of Fairlie, Fergusson, and Co., and liable for their obligations. The summons, as amended, concluded for payment of the balance stated as due by that firm in the above account, the same being converted into a sum of money sterling, at such rate of conversion as should be determined in the course of the process, "together with "interest at the rate of nine per cent. on the foresaid "sum, from 30th April 1810 till paid."

The defender alleged, that the word "nine," as denoting the rate of interest in the docquet at the

account, was written on an erasure, and could make no faith; and independently of this, he pleaded, inter alia, that there was no sufficient evidence of the debt being due by Fairlie, Fergusson, and Co.; that the debt being illiquid, it was necessary to call the representatives of all the partners of that firm before the action could proceed against the defender; and that the debt, if it had even been due, was cut off by the English statute of limitations. To these pleas the pursuer answered, that the docqueted account, signed by Fairlie, Fergusson, and Co., and the relative letter by a partner of the firm, amounted to an actual liquidation and written constitution of the debt, and proved Fairlie, Fergusson, and Co. to be directly bound for the amount; that, the debt being constituted, it was not necessary to call any other partner, or his representatives, and that the English statute of limitations did not apply.

The Lord Ordinary (26th November 1835) "repelled the defences; found that the pursuers are "entitled to the sum of 17,346. 5. sicca rupees, con-"tained in the docqueted account of the 1st of May "1810, converted, at the present rate of exchange, into "sterling money, with interest at the rate of nine per "cent. on said sum of sicca rupees, as so converted, "from the 30th day of April 1810 till decree; and "decerned for the same accordingly, with the legal "interest on the sum so decerned for until payment; "and ordained the pursuers, within fourteen days, to "give in a state of their claim, made up in terms of "this interlocutor; and found the pursuers entitled to "expenses."

In the state which was given in under this interlocutor, the pursuers, who stated the debt due at

FERGUSSON v. FYFFE and others.

4th May 1841.

Statement.

30th April 1810 at little more than 1,700*l.*, now claimed a sum of 15,732*l.*, as having arisen out of annual accumulations of interest, which they alleged to be allowed according to the practice in such accounts, as was exemplified in this account itself from the commencement of it in 1786. The defenders not only denied the practice as to such an account as the present, but pleaded that both the summons and the record were so prepared as to embrace no conclusion or plea except for simple interest, and to contain no averment as to practice.

The Lord Ordinary, "in respect that the interlocutor of the 26th of November last decerned for "the interest only, without accumulations, and that it "is incompetent for the Lord Ordinary to alter that "interlocutor, refused the claim so made, and appointed the state to be rectified accordingly."

The defender reclaimed against the first of these interlocutors, and the pursuers reclaimed against them both, in so far as refusing to allow annual accumulations of interest.

The pursuers also, in 1835, raised a supplementary summons, which expressly concluded for a balance computed on the principle of annual accumulations of interest: this action was reported to the Court. A case was then allowed to be laid before English counsel, whose opinion instructed, inter alia, that the English statute of limitations did not, in the circumstances, apply; and that the account and docquet, signed by Fairlie, Fergusson, and Co., together with the letter of William Fairlie, dated July 5th, were sufficient to establish, by the law of England, "that the firm of "Fairlie, Fergusson, and Co. became directly bound to

" Dr. Fyffe and his representatives, to pay them the " debt therein mentioned."

The Court afterwards " conjoined the original and " supplementary actions, and appointed mutual cases to " be prepared on the points not embraced in the " opinion of English counsel."

4th May 1841.

Statement.

Judgment of Court, 25th May 1838.

The Court (25th May 1838) pronounced the following interlocutor: — " The Lords, having resumed " consideration of this cause, with the opinion of " English counsel, and revised cases, and heard counsel " for the parties, find that the pursuers are entitled to " the sum of 17,346. 5. sicca rupees, being the balance " due on the docqueted account, converted at the rate " of exchange current in Calcutta by the latest " accounts, together with interest on the said sum so " converted at the rate of nine per cent. per annum, " and accumulated annually at the same rate, from the " 30th day of April 1810 to the date of citation in this " action, and with interest on the accumulated balance " at the foresaid rate from the date of citation to the " date of final decree, and interest on the accumulated " balance from the date of final decree until payment, " at the legal rate of interest; find, that the defender is " entitled to deduction from the annual accumulations " of interest of one per cent. for commission, and that " he is further entitled to deduction of the necessary " expense of remitting the money from India to this " country; find neither party entitled to expenses in " this process; alter the Lord Ordinary's interlocutors " of 26th November and 15th December 1835, and " repel the whole defences, so far as at variance or " inconsistent with the above findings, and decern;

FERGUSSON v. FYFFE and others. 4th May 1841.

"appoint the pursuers quam primum to prepare and "lodge a state of their claims against the defender, "in terms of the findings contained in this inter-"locutor."

The defender appealed.

Appellant's Argument.

Appellant.—The appellant cannot be sued by virtue of any original liability. It may be assumed that Dr. Fyffe, who confessedly was non compos in 1793, was in that state when the appellant became a partner on 1st May 1793; the account after that was an open account. Now Dr. Fyffe was clearly no longer in a situation to contract or to adopt any contract with the successive new firms of 1793, 1795, and 1810, nor to release the firm with which he had originally contracted; and there is no ground for making the new firms liable unless the old be released. The transfer of the account could only be with consent of the debtor and creditor. The principle which pervades the whole of the cases[1] is, that where there is a creditor on the one hand and a bank on the other, which has undergone changes in its partners, and the customer continues to deal with the partners, the sole question is, if the party depositing money with the former firm has by any act discharged that firm, for the new firm does not become bound, unless by express agreement, or circumstances from which an express agreement to release the former firm can be inferred. The case of Gouch v. Davies[2] at common law bears strongly on this view; see the

[1] Gow on Partnership, pp. 301, & 242, 243, and cases cited.
[2] 4 Price, 200.

opinions of Barons Graham and Wood, and see a case in equity to the same effect.[1] If a balance had been struck in Fyffe's lifetime, and if he knowingly had assented, the case might have been different.

The acknowledgment in the letter rendering the account in 1812, cannot bind the partners. There must be mutuality of contract. It was never assented to by the party capable of making it a contract; and no answer having been returned to the letter, it was a mere proposal, withdrawn by non-acceptance. Besides, the material feature in this part of the case is, that the account was not rendered to any agent or representative of the creditor authorized or entitled to assent on his behalf.

It is agreed that the present case is determinable by the law of England, and accordingly the statute of limitations was well pleaded in the Court below. There was a cause of action previous to the insanity in 1793; and if the statutory period of six years once begin to run, no subsequent disability shall stop its running; so that, although the disability ceased by the death of the party in 1810, a right of action could not arise in favour of the individual to whom the account in 1812 was sent, and therefore Murray v. East India Company[2] and Douglas v. Forrest[3] will not apply. In the latter case the cause of action did not exist in the lifetime of the party, and did not accrue till after his death.

The appellant is not bound to answer individually to this action, particularly as there are other parties liable

---

[1] Heath v. Percival, 1 P. Wms. 682.
[2] 5 Barn. & Ald. 204. [3] 4 Bing. 686.

FERGUSSON v. FYFFE and others.

4th May 1841.

Appellant's Argument.

in contribution. In Scotland all the partners, or their representatives, must be called.[1] The respondents admit this as to illiquid obligations; but in considering such a defence, the non-constitution of the debt must be admitted or assumed: M'Tavish v. Lady Saltoun[2] arose out of a liquid obligation.

Interest, which is generally allowed as a penalty, is not here chargeable; it was through default of the creditor that the debt was not paid. From 1810 till 1833 the appellant was guilty of no neglect in not paying the debt; there was no one entitled to receive it; see Murray v. East India Company.[3] If interest at nine per cent. be asked, on the footing that the parties had the use of the money, a court of equity would inquire if the money had been used since 1810, which is denied. The erasure in the docquet in the figure "9," by the law of Scotland, deprives the document of all faith.[4]

There is no ground for accumulation of interest or annual rests. It cannot be attempted in a court of law, and a court of equity will only listen to such a demand in cases of gross breach of trust. In merchants accounts compound interest is charged, not because as such it is allowable, but on the principle that you convert interest into capital by special contract[5]; but from a banker or merchant having a balance in hand, ordinary interest is only due, there being no

---

[1] A. v. B. 26th Feb. 1741, Mor. 14,560; Reid and M'All. v. Douglases, 11th June 1814, Fac. Coll.

[2] See Respondents Argument.

[3] Rep. in 5 Barn. & Ald. 211.

[4] Erak. 3. 2. 20; Tait on Evidence, p. 143—147.

[5] Ex parte Bevan, 9 Vesey, 223.

account going on. The cases[1] show that only simple interest, at the rate chargeable in the country where the debt was contracted, was allowed. The case of Palmer's Assignees v. Glas[2] is admitted to be the only precedent apparently hostile to the appellant; but there the question was raised by the original creditor. The party had the use of the money, and there were transactions till within a few months of the rendering of the account, and the balances might have been received at any moment. Besides, that decision is a doubtful one, for the proof of usage upon which the Court went was questionable.

Appellant's Argument.

Respondents.—The account rendered is evidence of the account as stated in the books. It is headed with the name of the appellant's firm in 1793, and signed by the firm in 1812. The appellant did nothing to discharge his liability when he retired; and as to discharging members of the former firms, the Court now presumes, upon the slightest evidence—the assent by a creditor, to a partner's discharge.[3] Here the account was rendered by the appellant's firm; no assent by the creditor was necessary, for the firm took upon themselves the debt, as stated in the account; it was the receiving the balance, having it, using it, and acknowledging it, that made them liable.

Respondents Argument.

The law of England must be looked to as to what

---

[1] Wilkinson, 28th June 1821, 1 S. & B. 89; Maxwell, Hyslop, & Co., 16th June 1824, 2 Sh. App. 451; Keble v. Graham's Executors, 4 W. & S. 166.

[2] 13 S., D., & B., 309.

[3] Hart v. Alexander, 2 Mees. & Wels. 484; Kirwan v. Kirwan, 2 C. & M. 617; 4 Tyr. 491; Thomson v. Percival, 3 Nev. & Man. 167.

FERGUSSON v. FYFFE and others.

4th May 1841.

Respondents Argument.

relates to the constitution of the obligation, but as to the remedy, the law of the forum where the remedy is sought will rule.[1] Now, as to the length of time, no Scotch prescription will apply[2], and the English statute of limitations is irrelevant as well as, in the circumstances, inapplicable.[3] As to the action being well directed against the appellant, M'Tavish v. Lady Saltoun[4] is conclusive.

Interest is due, not as a penalty, but under a contract of loan, by which the company, receiving the money and using it as assets, were liable at the rate actually allowed in their books, as proved by the account, which, if it were fraudulently erased, the fact might be proved by production of the books, not however called for. The case of Palmer's Assignees v. Glas[5] was well decided, upon the custom in India; and accumulation ought to be allowed in calculating interest on this account.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case Dr. Fyffe, who resided in Calcutta, in the year 1786 opened an account with the then firm of Fergusson and Fairlie, and continued it with Fairlie, Reid, and Company, which was the firm adopted by the house upon a change of partners in 1790. On the 1st of May 1793

---

[1] Story, Conf. Laws, p. 482; Don v. Lippman, 2 Sh. & M'L. 682; Bulger v. Roche, 11 Pickering (American) Rep. 36.

[2] Ersk. 3. 7. 18.

[3] Douglas v. Forrest, 4 Bing. 686; Rhodes v. Smethurst, 4 Mees. & Wels. 42.

[4] 3d Feb. 1821, Fac. Coll.

[5] 13 S., D., & B., 309.

the appellant, Mr. Fergusson, was admitted a partner into the firm of Fairlie, Reid, and Company, and continued a partner in the business from that time till 1820, when he retired; the house having in 1795 assumed the style of Fairlie, Gilmore, and Company, and in 1810 that of Fairlie, Fergusson, and Company, and in 1818 that of Fergusson, Clark, and Company. Mr. Fairlie, who was a partner when the appellant was admitted in 1793, continued to be so till 1818. Throughout all the changes of partnership the account of Dr. Fyffe was carried on in the books of the new firm, and it was a debt appearing upon the books of the several firms of which the appellant was a partner during the whole period of his continuing in the house.

It seems to have been assumed by both sides that in 1793 Dr. Fyffe became non compos mentis, and that he so continued till his death on 9th May 1810; but as to the precise time at which it commenced, or any circumstances connected with it, I find no other evidence. It does not appear that any proceedings were adopted for appointing others to act in the affairs of Dr. Fyffe on account of his lunacy, and he was during all this time in India; and the house at Calcutta continued to deal with his funds as they had before the period of his alleged insanity. It would therefore be extremely difficult, under any circumstances, for the house to support a case for withdrawing from their customer any benefit to which their mode of keeping the account would have entitled him, if there had not been any question as to his sanity. In the present case I think the house are at all events precluded from so doing.

In 1812 one of the then partners in the house, in which the appellant was also at the time a partner, in

FERGUSSON v. FYFFE and others.

4th May 1841.

Ld. Chancellor's Speech.

answer to an inquiry made by a person claiming to be interested in the estate of Dr. Fyffe, communicated the statement of account, as made up in the books of the firm, up to the 30th April 1810, by which a balance of 17,346. 5. sicca rupees was made to be due to him, and to which was appended this note: "To bear interest at nine per cent. per annum." The letter which enclosed it bore date the 5th of July 1812, and was in these words:—"I now enclose you Mr. Charles "Fyffe's account from its commencement, which I "received some time ago from Calcutta; the balance "at 30th of April 1810 was, rupees 17,346. 5., chiefly "arising, you will observe, from the high rate of interest "allowed upon it."

Administration to Mr. Charles Fyffe was not obtained till 1835, but nothing was done in the mean time to affect the relative situation of the firm and of the estate, and by their summons the administrators assume the account so stated by the firm, and no error or mistake in that account is now established; it is therefore much too late for the house to say that they allowed too high a rate of interest up to the 30th of April 1810, or computed it in a manner too favourable to their customer. I think, therefore, that the amount of debt due by the firm to the estate of Charles Fyffe has been correctly assumed to be 17,346. 5. sicca rupees on the 30th of April 1810. At what rate interest ought to be computed from that date, and whether with accumulations or not, remains to be considered.

It was said that William Fairlie wrote a prior letter to the same person on the 23d of March 1812, stating that the interest of money had fallen greatly in Bengal, and that seven per cent. was then the highest rate

allowed; but that letter, although set out in the summons, is not admitted by the appellant, and has not been produced or proved, and if it had, it could hardly supersede the memorandum at the foot of the account sent on the 5th of July following.

But then it was said that the figure "9" in the memorandum was written on an erasure. The account to which that memorandum is appended purports to be an account current signed by the firm, and if the paper produced has been altered in this figure since it was delivered, it was competent for the defender to have stated and proved the fact, and that it does not, as it now appears, correspond with the books of the firm. But no such proof has been made; it must therefore be considered as the superscription of the firm on the 5th of July 1812, when the account was delivered by William Fairlie, one of the firm, that nine per cent. would be in future the rate of interest which the balance then admitted to be due would bear.

The question of accumulation stands upon a very different footing. Upon that subject the memorandum contains no agreement for the future; indeed it may be considered as excluding all that it does not provide for, and what it does provide for is only payment of interest at a certain rate. It is true that, practically, the account had ceased to be an account current from the year 1793, but up to that time it had been, in the most correct sense, an account current; and it ceased to be so, not by any act or agreement of the parties, but by the cessation of all transactions, arising probably from the situation of Charles Fyffe. The account, however, continued to be carried on in the same manner as before until the 30th April 1810; and when that account was

FERGUSSON v. FYFFE and others.

4th May 1841.

Ld. Chancellor's Speech.

made up Charles Fyffe was dead, he having died on the 9th of May 1810. From that time there was no party with whom any account current could be carried on, there not having been any representative of Charles Fyffe for many years afterwards. The accounting parties made up their account to the death of Charles Fyffe, stating their intention to pay nine per cent. upon the balance; and from such mode of making up the account, and such promise to pay nine per cent. upon the balance, the firm are not at liberty to withdraw. But then the inquiry is, whether the accounting parties are to be liable beyond what they have so undertaken, and are to be charged with compound interest. The first question which occurs is, can there be a title to compound interest without a contract expressed or implied, from the mode of dealing with former accounts, or custom? And if not, the absence of any party with whom any such contract can have been made must be fatal to the claim. Generally a contract or promise for compound interest is not available in England, as was decided in ex parte Bevan, 9 Vesey, 224, except perhaps as to mercantile accounts current for mutual transactions; a character which this account had lost from at least the death of Charles Fyffe. How, then, can compound interest be chargeable upon any account closed?

The Court of Session appears to have taken a very correct view of the international law upon this subject, in considering the law of the country where the debt is contracted as furnishing the rule by which the nature and extent of the obligation were to be tried. But to carry out that principle to its proper length, the same rule must be applied to the question of interest, as con-

stituting part of the contract expressed or implied, and therefore as affecting the nature and extent of the obligation; and the law of Scotland can be referred to only as to questions concerning the remedy, as the country in which the action is brought, in which must be included the question as to length of time. No Scotch prescription applying to the case, the English statute of limitations is irrelevant; but if it had been material, it would not have afforded any bar, as the time never began to run.

The distinction between the applicability of the lex loci contractûs and the lex fori, with reference to the nature and character of the debt and the right to the remedy, is well exemplified in the case of the British Linen Company v. Drummond, in 10 Barn. and Cress. 911, in the Queen's Bench, and in Don v. Lippmman, in the House of Lords, 2 Shaw and M'Lean, 723. In inquiring therefore into the title to compound interest, Scotch cases are not those which ought to be primarily consulted, and it would not be possible, upon English authorities, to support the claim. It happens that there is a decision of the House of Lords upon this subject, which is conclusive against the claim; I mean the case of Boddam v. Ryley, reported in 1 Brown's Chancery Cases, 239; 2 Brown's Chancery Cases, 2; and 4 Brown's Cases in Parliament, 561. In that case there were partnership accounts and a private account, and in the books the account had been made with Indian and compound interest. At the hearing Lord Thurlow said, "Spencer's representative claims nine "per cent. from year to year, upon the ground that "the books were so made up, but I think that no such "interest can be allowed; for although, where there

FERGUSSON v. FYFFE and others.

4th May 1841.

Ld. Chancellor's Speech.

"are cross accounts, interest is as fair to the one as "the other, yet it is not fair after closing the trade." From this decision of Lord Thurlow there was an appeal to the House of Lords, raising distinctly the claim to compound interest; but the decree was affirmed.

The present is a much stronger case against the claim than that of Boddam v. Ryley, because there does not appear to have been in that case such an absence of any party to consent to the mode of stating their accounts as there is in this. On the other hand, and in favour of the claim to compound interest, several cases were cited as decisions of the Court of Session, of which Keble v. Graham, 6 Shaw and Dunlop, 119, was one; but I do not find that in that case, as there reported, there was any question raised as to compound interest. In Cruickshank v. the British Linen Company, 13 Shaw and Dunlop, 91, there was a bond, which it was said amounted to a contract for a compound interest, as to the legality of which no question appears to have been raised. Palmer and Co. v. Glas, 13 Shaw and Dunlop, 308, is the only case in which the point was expressly raised, and in that case the Court of Session certainly decided that compound interest was to be calculated upon the annual balances after the death of the debtor. The Court, however, very correctly considered that question as one to be decided by the law of the country where the debt was contracted, and not by the law of Scotland, where the action was brought. The decision, therefore, is not a Scotch judgment upon a question of Scotch law, but a judgment of a Scotch court upon English law or an Indian custom, and seems to have been founded upon very imperfect information, which the accountant is stated to have received

4th May 1841.

Ld. Chancellor's Speech.

from some gentleman acquainted with the course of business in India; but how far applicable to the circumstances of the case, or what such information was, does not appear. The Lord Ordinary is represented as having thought it doubtful, whether there should be any accumulation after the death of the debtor; and Lord Medwyn said that he felt a little more difficulty as to the accumulation. It is not possible, I think, to put this decision in competition with the others to which I have before referred.

It appears to me, therefore, that the proper course will be to vary the interlocutor appealed from, by declaring that interest at nine per cent. ought to be calculated upon the balance of 17,346 5 sicca rupees, from the 30th of April 1810 up to the time of the decree, but without any compound interest or annual rests; and that the cause be remitted to the Court of Session, with this declaration.

Judgment.

The House of Lords declared, That interest at nine per cent. ought to be calculated upon the balance of 17,346 sicca rupees 5 annas, mentioned in the appeal, from the 30th of April 1810 up to the date of the final decree to be made in pursuance hereof, but without any compound interest or annual rests: And it is ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration.

OLIVERSON, DENBY, and LAVIE — SIMPSON and COBB, Solicitors.

[*4th May* 1841.]

(No. 10.) ANDREW BELL, formerly Teacher of Mathematics in the Dollar Institution, Appellant.[1]

[*James Anderson.*]

Rev. ANDREW MYLNE, D.D., and others, Trustees of the Dollar Institution, Respondents.

[*Lord Advocate (Rutherfurd) — Wildman.*]

Schoolmaster — Trust. — Held (affirming the judgment of the Court of Session), that the trustees of a school established by private charity, having the choice of the teachers, have a power of dismissing them at pleasure.

Practice — A. S., 11th July 1828, *sec.* 65. — *Stat.* 6 *Geo.* 4. *c.* 120. — 55 *Geo.* 3. *c.* 42. — 59 *Geo.* 3. *c.* 35. — 1 *Will.* 4. *c.* 49. — In an action of damages by a schoolmaster against trustees of a private institution for alleged illegal dismissal, the cause was re-transmitted from the jury roll to the Court of Session, for the purpose of determining points of law or relevancy occurring previous to trial; and the Lord Ordinary, in terms of sec. 65 of A. S., 11th July 1828, reported the cause on cases, the record being still unclosed: — Held, that the Court, being satisfied that the pursuer had no relevant ground for damages, had rightly dismissed the action de plano.

Pleading. — A practice of partially setting out in the pleadings a document containing the substance of a contract, and suppressing material parts of it, animadverted on. (See p. 293.)

---

[1] 16 D., B., & M., 113.

1st Division.

Lord Ordinary Fullerton.

Statement.

MR. John M'Nab bequeathed the sum of 92,345*l.* to trustees, directing it to be applied "for the benefit of a "charity or school for the poor of the parish of Dollar." The ministers and elders of that parish for the time being were declared trustees and managers of the fund. No limitation was made as to their powers of appointing or dismissing teachers. An academy for the purpose of education was established by the trustees at Dollar, and teachers were appointed for different branches of learning, including mathematics. The minister of the parish, the Reverend Dr. Mylne, the respondent, was appointed principal of the institution, with a salary. The salary of each teacher was fixed at 120*l.* per annum, with an allowance of 35*l.* for rent, where a free house was not given. The minutes of the trustees prior to 1821, containing the appointment of the several teachers, bore that they were respectively appointed during pleasure. In that year Mr. Andrew Bell, the appellant, was appointed teacher of mathematics, and the minute of appointment bore, that he was so appointed "upon "the same terms and limitations as the other teach-"ers." Certain letters as to the nature and tenure of the appointment were, previous to its taking place, addressed by the above-named respondent to the appellant; among others, a letter of the 5th October 1821, which bore:—"I believe I mentioned to you "at Dollar the outline of the duty required, the "salary, &c. I beg again to state to you, that, "though at first you, if elected, may not have above "two or at most three hours teaching, yet the trus-"tees reserve to themselves the right of enlarging the "hours according to circumstances. The salary is "120*l.* with a house, or 35*l.* for the rent of a house, at

BELL v. MYLNE and others.

4th May 1841.

Statement.

"the option of the trustees. The appointment is only "during pleasure, but this need not stagger you; all "the other masters are in the same predicament, and "the reason of our making the appointment in these "terms is, that we may not be embarrassed with the "claims about right by any of the masters in getting an "act of parliament to regulate the whole. I mention "these things that there may be no complaint after-"wards in the event of your being elected." See the import of this and the other letters, commented on by the Lord Chancellor, in his opinion, postea.

In April 1828 the trustees, being dissatisfied with the appellant, intimated to him that his services as a teacher should not be required after the ensuing Whitsunday, but directed his salary to be paid up to 1st October ensuing, and a half year's house rent also to be paid as from Whitsunday to Martinmas. They then elected a new teacher of mathematics, who entered on the duties of his situation.

In 1836 Bell raised an action of damages against the Reverend Andrew Mylne and the other trustees of the Dollar Institution, alleging that they had unlawfully dismissed him from an employment which he held ad vitam aut culpam.

In setting out the substance of the agreement with his employers in his summons, particularly the letter of 5th October 1821, he omitted the substance of that part of the letter which bears that "the appointment is only "during pleasure."

The trustees pleaded that they had the power of dismissing the teachers at pleasure, which in the present instance they had legally exercised.

In his condescendence the appellant stated various

circumstances, which he offered to prove, in support of the unlimited tenure of his office and the illegality of his dismissal.

BELL v. MYLNE and others.

4th May 1841.

The Lord Ordinary sent the cause to the jury roll to have issues prepared; but before that was done, it was re-transmitted to the Court of Session roll, to have the points of law or relevancy disposed of. The Lord Ordinary, by virtue of the 65th section of A. S., 11th July 1828, ordered cases to the Court.

Statement.

The Court de plano pronounced the following interlocutor:—"15th June 1838. The Lords having advised "the cases for the parties, and heard counsel, assoilzie "the defenders[1] and decern, and of consent find no "expences due by the pursuer."

Judgment of Court, 15th June 1838.

The pursuer appealed.

Appellant. — The Court had no right or power to assoilzie the defenders without a trial by jury. Being an action of damages, the cause was appropriated for trial and determination by a jury, and was accordingly remitted for that purpose to the roll of jury causes. Neither party could disturb the course which had been thus adopted for the decision of the case. The interlocutor remitting to the jury roll was final and conclusive; it is the interlocutor pronounced when the Lord Ordinary is of opinion that there should be a jury trial, and it is expressly provided by the 15th sect. of the 59 Geo. 3. chap. 35, "that it shall not be com-

Appellant's Argument.

[1] See, in report of Scott v. Curle (post, p. 323), the proper form of interlocutor remitting to the Lord Ordinary "to close the record and "assoilzie the defenders," &c.

BELL v. MYLNE and others.

4th May 1841.

Appellant's Argument.

"petent, by representation, reclaiming petition, bill "of advocation, appeal to the House of Lords, or "otherwise, to bring under review any interlocutor, by "the said Divisions, Lords Ordinary, or Judge of the "Admiralty ordering a trial by jury."

There is, no doubt, a provision in the 12th sect. of that statute, by which power is given to the jury court, "when it appears to the said court, in the course of "settling an issue or issues, or at any time before trial, "in the cases remitted to them as aforesaid, that there "is a question or questions of law or relevancy which "ought to be previously decided," to remit back the case to the Court of Session, that the question may be decided there.

But this provision respects interlocutory judgments only. It does not empower the retransmission of the action in order to its being dealt with as not a jury cause,—in order that the Court of Session might judge in it without trial by jury. Such a construction would be inconsistent with and in defeasance of the imperative enactment of the statute, which, from motives of expediency and policy, has declared the Lord Ordinary's interlocutor to be conclusive that the cause should be tried by jury; and, accordingly, in the case of Montgomery v. Boswell[1], decided in this House 23d April 1839, it was observed by the noble lord who moved the judgment, that the finality of the remit to the jury roll was clear under the statutes, and could not be evaded or defeated by the process of re-transmission.

The terms in which the provision as to re-transmitting is expressed, remove all doubt. The "questions of

[1] M'L. & Rob. App. p. 136.

" law or relevancy," for the decision of which the power of re-transmission is given, are those which the Jury Court might think proper to be settled " previously " to trial; importing, necessarily, that a trial at all events should take place. The object of such previous decision was to have points of law fixed by the Court in which the cause itself depended, which might be laid down by the judge presiding in the separate Jury Court at the trial.

Were it necessary, the appellant humbly thinks that he would be entitled to carry his objections to the judgment appealed against a great deal further, and to contend, that the provisions as to re-transmission are now no longer in operation, since the Jury Court was abolished as a separate tribunal, and its functions united with those of the Court of Session. To this effect is the opinion of the Lord Chancellor, in moving the judgment of reversal in the case of Montgomery v. Boswell. His Lordship there held, that there was no reason for requiring the transmission of causes from one roll to another in the same court and before the same judge; otherwise the enactment as to the finality of the remit to the jury roll, in order to trial by jury, might be made nugatory in every case.

Such an appointment during pleasure is illegal. Besides, it was not made during pleasure; and the appellant, in his condescendence, has stated facts sufficient to infer damages, if he be allowed to prove his case.

Respondents. — The whole case of the appellant appears upon the correspondence, and he has clearly no title; and that being the case, the Court did right in dismissing the action, for it has since been held by this

BELL v. MYLNE and others. 4th May 1841. Respondents Argument.

House, in the case of Duncan v. Findlater[1], that when, before directing an issue, the cause is in such a state as enables the Court to dispose of it, judgment ought to be given. The appellant ought, in fairness, to have stated this new matter to the Court before it pronounced judgment. There is clearly no case on the merits.[2]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, I certainly regret that your Lordships time should have been occupied in hearing more than the opening of this case. It is a question raised as to the course of practice in the Court of Session, arising out of the provisions of several acts of parliament, which have been made the subject of discussion. Upon the merits there is scarcely any thing which I can see in the case upon which any argument can be urged.

The appellant was appointed assistant instructor and master in a certain department in a school under the provisions of a gift of John Macnab, in which he says, "The other moiety or share I would have laid in the "public funds, or some such security, on purpose to "bring one annual income or interest for a benefit of "a charity or school for the poor of the parish of "Dollar, where I was born: that I give and bequeath "to the minister and church of that parish for ever, "say to the minister and church officers for the time "being, and no other person shall have power to "receive the annuity."

No appointment is made by the author of the gift,—

---

[1] M'L. & Rob. App. 911.

[2] Gibson v. Ross, 1 Robinson App. 1; Doe v. Haddon, 3 Doug. 310; Philip v. Bury, 1 Ld. Raym. 5.

no direction that there shall be a master, and that he shall have a certain income for his support and maintenance; but the property is given to the trustees with as large a discretion as can be entrusted to any body of individuals, the only direction being, that it shall be applied in the establishment of a school for the poor of a particular parish.

In execution of the trust the trustees established a school; and among the letters written to the appellant there were three from Dr. Mylne, who was negotiating with the appellant, upon the subject of being appointed an instructor in the school, by one of which it is stated, "that the salary is 120*l.* with a house, or 35*l.* for the "rent of a house, at the option of the trustees. The "appointment is only during pleasure, but this need "not stagger you; all the other masters are in the "same predicament, and the reason of our making the "appointment in these terms is, that we may not be "embarrassed with the claims about right by any of the "masters in getting an act of parliament to regulate the "whole." Subsequently to that another letter was written, and the appellant accepts the office; but among other letters which he states in his summons, he does not state the part of the letter which is important, which states it to be an appointment only during pleasure, but states it thus: "That in a subsequent letter "addressed by Dr. Mylne to the pursuer, of date "5th October 1821, the salary is stated to be 120*l.* "with a house, or 35*l.* for the rent of a house, at the "option of the trustees." He states so much of the letter as provides him with the salary, but omits that part of the letter containing the statement that the office is only to be held during pleasure; a mode of

BELL v. MYLNE and others.

4th May 1841.

Ld. Chancellor's Speech.

proceeding not much approved of in this country, and one which is wholly useless; because, suppressing a document can answer no useful purpose, although it may occasion additional expense and delay. Where a document contains the substance of a contract, it is useless to set it out partially. However, the pursuer was bound to set out that which stated the salary, and which constituted a part of the contract, and therefore we have the letter of the 5th October alluded to. Then he says, that in a third letter from Dr. Mylne his appointment was announced to him in the following terms: "Edinburgh, 15th of November 1821. Dear "Sir, I waited anxiously several days for your letter, "being under the necessity of coming here to assist "at the sacrament. On Tuesday last, before setting "out, I held a meeting of the trustees, and sounded "them on the subject of appointing you to the mathe- "matical department of the institution, when they left "it entirely to myself. As I had not heard from you, "no minute was made out at the time, but from what "I have mentioned you may consider the appointment "as made. I am extremely anxious that you should "lose no time in coming to Dollar; and I shall hand "you a regular letter." Now, that letter neither specifies the duration of the office nor the salary; that letter of itself constitutes no appointment; it does not inform the party of the tenure of his office nor the salary he is to receive. It was quite unnecessary to do so, that was stated in the former letter; and these letters constitute the appointment, because there can be no doubt of the nature of the conditions, which were understood: the salary was 120*l.* a year, but the master was to hold it during pleasure.

Then a point of law is raised: it is said that it was contrary to the law of Scotland. Why?—these trustees have the same power as the author of the gift; they are bound merely to apply it to the erection of a school for the use of the poor in a particular parish; they appoint the salary, of which they are the judges, and they say that the office shall be during pleasure.

It is not disputed that there is no law in Scotland to prevent parties in a private establishment appointing a master during pleasure; it would be very strange if there should be such a law, but fortunately it does not exist. There are some schools in Scotland, and in this country also, where masters have a freehold in their office, and many contests have arisen in consequence with the trustees, which have generally ended in reducing the benefits of the charity by the expenses of the contest; and where they succeeded, they have generally fixed a very heavy burden upon the funds out of which relief was to be afforded to the poor. There are cases of both descriptions in both countries, but nothing throwing any doubt upon the power of persons administering a private charity to appoint persons to execute the office of master during pleasure; that is the foundation of the pursuer's title. If he does not show the court a case for damages, from having been removed, he fails in his case. He seems to have been well advised before the commencement of his suit, because he carefully avoids setting out that part of the letter which is fatal to his case. He comes before the Lord Ordinary in the first instance, and he ought to show a primâ facie case of damage to be tried by a jury; but before that stage of the cause arrives the real state of

BELL v. MYLNE and others.

4th May 1841.

Ld. Chancellor's Speech.

the case becomes known, and it is found that there is an apparent objection on the face of the documents, which raises a doubt whether the appellant can be entitled to any thing. The Court of Session had the case before them, and they viewed the question, not as a matter of fact in dispute, but upon the face of the very documents—the foundation of the title stated by himself, they saw there was no possible case to entitle him to any damages.

Then it is said, though the judges of the First Division saw that manifestly upon the face of the proceedings, it was not competent to them to deal with it as they have done, namely, to decide against the pursuer. For what possible purpose could it be sent to them (it is admitted it is well sent to them) but to decide the point of law, and prevent its going to a trial by a jury? The Court saw, not upon disputed facts, but upon undisputed facts, and the pursuer's own showing, that it would be quite absurd, in a case in which it was clear he could not recover, that he should go to a jury. There can be no course of practice to lead to such an absurdity, and so the Court of Session decided; taking the documents upon which his case rested, they decided against him, and held he was not entitled to what he asked.

It appears to me that this is a case, of all others, since I have had a seat in the House, which ought not to have been brought here, and the appeal must therefore be dismissed with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and

the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP — RICHARDSON and CONNELL, Solicitors.

(No. 11.) [27*th May* 1841.]

WILLIAM DILL (Mrs. MACHARG'S Executor), Appellant.[1]

[*Biggs Andrews — James Anderson.*]

THOMAS Earl of HADDINGTON and others (Mr. HOUSTON'S Trustees), Respondents.

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

Provision to Wife — Clause — Vesting. — Terms of a postnuptial contract, upon the construction of which, Held (reversing the interlocutor of the Court of Session), that a provision of a sum of money by the husband imported a gift to the wife, and became vested in her as her absolute property upon her surviving her husband, and there being no issue of the marriage.

Rules for construing ambiguous clauses in instruments, p. 311.

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

ALEXANDER Houston of Clerkington, now deceased, was married to Miss Helen Mackie. No settlement was made previous to the marriage. By a postnuptial contract by these parties, dated the 6th and 30th April 1785, Mr. Houston bound himself, his heirs and executors, to pay to his wife a free yearly income of 400*l.*, and to grant her a life-rent infeftment over certain heritable property in security thereof.

He further bound himself, and his heirs and executors,

[1] Fac. Coll.; 2 D., B., & M., 7th Dec. 1839.

" to make payment to the said Mrs. Helen Houston, " his wife, or to any person or persons she shall " appoint by a writing under her hand, at any time in " her life, with or without the consent of her said hus- " band, and that whether she survive or predecease him, " and whether she have issue or not, of the sum of " 3,000*l.* sterling money, or such other lesser sum as she " shall direct, and that at the first term of Whitsunday " or Martinmas next after the death of her said hus- " band, in case he shall survive her, or shall predecease " her without leaving issue of the marriage, or at the " first of these two terms next after the failure of the " issue of the marriage, in case he shall predecease her " leaving issue, who shall fail before her, or at the first " of these two terms next after her decease, in case " she shall survive him, having issue of the marriage " then existing, or at any term of Whitsunday or " Martinmas after any of these events respectively, so " that it shall not be in the power of the said Mrs. Helen " Houston, or the persons to whom she shall appoint " the foresaid sum of 3,000*l.* or any part thereof to " be paid, to uplift the same during the life of the said " Alexander Houston, or even after his death, during " the joint existence of the said Mrs. Helen Houston " and the issue of this marriage, and with 4*s.* of penalty " for each pound of principal in case of failure, and " the legal interest of the said principal sum, from the " term at which the same shall be appointed to be paid, " during the not-payment of the same; but with this " provision alwise, as it is hereby specially provided " and declared, that in case the said Mrs. Helen Hous- " ton shall happen to survive her said husband and the " issue of the marriage, and shall ask and recover pay-

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Statement.

"ment of all or any part of the foresaid sum of 3,000*l.* "sterling, then and from thencefurth her said liferent "annuity of 400*l.* sterling shall suffer such a restriction "as shall be equal to the legal interest, for the time, of "the principal sum which she shall so recover."

The deed also contained a special proviso and declaration, "that in case the said Mrs. Helen Houston shall, "at any time during her life, uplift the sum of 3,000*l.* "sterling, herein provided to be paid to her in manner "after mentioned, or any part thereof, then and from "thencefurth the said annuity of 400*l.* sterling, pro-"vided to the said Mrs. Helen Houston, as said is, "shall suffer such a restriction and abatement as shall "be equal to the legal interest for the time of the sum "so to be uplifted by her, and that in manner more "particularly after mentioned, and payable alwise, the "annuity remaining after such restriction and abate-"ment, by the proportions, at the terms, and with the "penalty before mentioned."

In 1816 Mr. Houston settled an additional annuity of 600*l.* on his wife, and also the liferent use of the mansion-house, offices, lawn, garden, &c. at Clerkington, along with the life-rent use and possession of the household furniture there, and a gift of certain effects belonging to him.

Mr. Houston died in 1822, without issue of the marriage, having appointed the respondents his trustees and executors. His widow occupied the house at Clerkington till her death in 1837. She never received or uplifted any part of the 3,000*l.*, nor granted any deed specially in relation to the same, or any part of it. She executed a will in 1804, which made no reference to the 3,000*l.*

In November 1837 Mrs. Helen Macharg, as executrix dative qua nearest of kin of Mrs. Houston, brought an action against the respondents, concluding for payment of the 3,000*l.*, with the penalty and interest, "the same "having vested absolutely in Mrs. Houston, as a debt "due to her from the estate of her late husband."

Among other defences, the respondents pleaded, 1. Nothing was conveyed to the late Mrs. Houston but a faculty or power to uplift or dispose of, by a writing under her hand, the whole or any lesser part of the sum of 3,000*l.* That faculty was personal to herself; and as she never exercised it during her life, it fell by her death; and as the sum of 3,000*l.* never vested in her during her life, it cannot be taken up or claimed by her executors ab intestato. 2. As Mrs. Houston left a will, which contains no reference to this sum of 3,000*l.*, it must be presumed that she purposely abstained from exercising the faculty, and from disposing of the whole or any part of the aforesaid sum.

The pursuer lodged in process the following minute: "Denying the statements in the defences, in so far as "they are not in precise accordance with those in "the summons, the pursuer is willing to close the record "upon these two papers."

The record having been closed on the summons and defences and the above minute, the Lord Ordinary, after hearing parties, pronounced the following interlocutor, adding the subjoined note.[1]

"27th February 1839. The Lord Ordinary, having

[1] "*Note.*—This case is not without difficulty, from the singularity of "the terms in which the provision of 3,000*l.* in the postnuptial contract

DILL v. EARL OF HADDINGTON and others.

" heard the counsel for the parties on the closed record, " writs produced, and whole process, repels the defences,

27th May 1841.

Statement.

" is conceived. But, on the whole, the Lord Ordinary has come to be " satisfied, that, according to the just construction and true meaning of " that deed, the said provision was fully vested in the widow, and " became, to all intents and purposes, her property, if not from the first " constitution of the trust, at all events at the first term after the death " of her husband without surviving issue of the marriage. Even after " that time, it is indisputable that she had all the rights and powers over " this sum which could be enumerated in the most comprehensive " definition of absolute and entire property. She could call it up as " freely and directly as if she had herself lodged it in a bank on a " deposit receipt. She could spend or lend it out anew to the original " trustees, or to any other party, without calling it up herself. She " could assign and make over the instant right to it, onerously or gra- " tuitously, mortis causa or inter vivos, to any one she chose. If she " married a second time, the entire right to it would pass to her new " husband jure mariti, whether she wished it or not; and finally, her " own creditors, or the creditors of such second husband, could attach, " pursue for, and recover it, in spite both of her and the defenders. It " is difficult for the Lord Ordinary to conceive how a fund, over which " she had thus all the imaginable rights of a proprietor, should yet not " be vested in her, so as to entitle her next of kin to succeed to it ab " intestato.

" The opposite proposition, however, is rested on two points; first, " and principally, on the admission of the ordinary destination in such " provisions to the 'heirs, executors, and assignees of the wife,' and the " introduction in its stead of a precise specification of a person to be " nominated in a writing under her hand, as the only party who was to " take after her or in her right; from which it is alleged that an abso- " lute exclusion of her successors ab intestato is necessarily to be " inferred. The second or corroborative argument on the part of the " defenders is derived from the apparent uselessness of this anxious " power of nomination and appointment, if the wife was herself vested " with the full right of property, which must necessarily have carried " such a power, and a great deal more. When duly considered, how- " ever, neither of these views appears to be maintainable.

" The mere omission of the ordinary remainder to heirs, executors, " and assignees is plainly of no consequence, where the words are suffi- " cient to carry a direct (and not contingent) right of property to the " person actually named, especially in the case of a mutual and onerous " provision, like that in a contract of marriage; while the specific power " to nominate an assignee or successor, even during the life of the hus- " band, might well have been thought not to follow from the mere " constitution or vesting of the right itself in the person of a married " woman. Even if it were to be held, therefore, that the wife was the

" and decerns in terms of the conclusions of the libel; " finds expenses due, allows an account thereof to be

" proper beneficiary as to this sum, from the first constitution of the " trust, the insertion of this specific power of appointment would not " be either superfluous or unaccountable; since, without it, no such " power could be competently exercised during the subsistence of the " marriage.

" But the Lord Ordinary conceives that the best explanation of this " perplexing part of the deed is to be found in the supposition, that it " was understood by the parties to it (whether that view was legally " correct or not) that the right to this 3,000*l.* would not vest fully in " the wife during the life of the husband or of children by whom he " was survived, nor until the full right to demand payment of it had " opened to her, free of all conditions or qualifications, by her being the " only survivor. How the law would have construed the deed if the " first had been the case that occurred, it is not now absolutely necessary " to determine, though it is easy to see that the claim of her repre- " sentatives would then have been encumbered with difficulties to which " it is not now liable.

" If she died before her husband, and without making any appoint- " ment, it might obviously have been maintained that the property was " still in the trustees, and that all the right she had ever over it was " truly a mere power or faculty to affect its ultimate vesting when the " proper time arrived, by the death of the husband; and that, if she " predeceased him without executing that power or exercising that " faculty, it would remain with the trustees for the general trust pur- " poses, and would never be claimed by the legal representatives, as " having never been truly in her person.

" The Lord Ordinary thinks the tenor of the deed is sufficiently " explained by assuming that this was the view of the case entertained " by the framer of it. But he is also of opinion that it is the sound " and the true view. By the constitution of trust the vesting of all " future and contingent interests may be competently suspended, espe- " cially in mere money provisions; and so long as all actual rights are " contingent as well as future, it will generally hold that they are so " suspended, and that in the interim there is no vested property but " in the trustees. Now, the wife was here to have no right to draw this " money during the life of her husband, or even after his death, while " issue of the marriage survived. Her own actual or beneficial right to " it, therefore, was truly contingent, and might never have opened in " her life; and if so, the property consequently remained vested in the " trustees, while it was still in contemplation to give her a power to " dispose of it by special deed; and not only was such a provision as " actually occurs in this contract necessary, but it was obviously the " fittest and most natural way of effecting that purpose; and what was " given was truly nothing more than a power or faculty to affect a

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Judgment of Court, 7th Dec. 1839.

" given in, and remits the same, when lodged, to the " auditor, for his taxation and report."

The respondents reclaimed, when the Lords of the Second Division pronounced the following interlocutor: —" 7th December 1839. The Lords, having heard " counsel for the parties, and advised the case, alter the " interlocutor of the Lord Ordinary submitted to

---

" subject which did not belong to her, which must be exercised in " terminis, in order to be available, and left nothing to be taken up by " her representatives ab intestato, if she died without so exercising it.

" But after the husband's predecease without issue of the marriage, " the whole aspect and state of the case were changed. There was no " longer any contingency, or even futurity, in the description of her " right; all pretence for a suspensive or fiduciary vesting in the trus- " tees, as for uncertain beneficiaries, was at an end, and they were direct " and full debtors to her, and to her alone, for the money. It seems " really impossible, therefore, to doubt that the full property was then " vested in her; and if it was so vested, it seems plain that without a " proper clause of return, or a most express exclusion of her represen- " tatives ab intestato, it must go to those representatives.

" To infer or construe such a clause of return or such an exclusion " out of the granting of a specific power of assignation, would be " difficult under any circumstances, and however hard it may be to " account, on any other assumption, for the granting of such a power. " But if there was no proper vested right in the wife herself till after " the death of the husband and children, and if her ever having any " such right was consequently a matter of contingency, the necessity " and the object of granting that power with a view to one result of " the contingency are at once apparent, and the whole difficulty of the " case is solved, in the Lord Ordinary's apprehension, by holding that " the power was granted to enable her to affect the fund in question in " the event of its never vesting in her, but flew off and became null " and inoperative as soon as the object or necessity of it ceased, by " the full right to it vesting, by her sole survivance, in herself. The " expression is not so lucid, perhaps, as might be desired, but the object " and purpose are thought to be plain enough; and, at all events, the " Lord Ordinary can never hold that the constitution of a special " power, which might be necessary in certain events, can either bar " the vesting of a right, in which all the imaginable tests and attri- " butes of a vested right are combined, or imply a clause of return, " or a capricious and most improbable exclusion of legal heirs or " representatives."

" review, sustain the defences, assoilzie the defenders, " and decern."

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

The appellant, as the executor of Mrs. Macharg, who died since the date of the above judgment, appealed.

Appellant's Argument.

Appellant. — The subsequent deeds to which the Court below referred do not affect the question, because in all of them there is a reservation of the provisions in the marriage contract. But it was incompetent to go to subsequent transactions, in order to ascertain the meaning of the contract. Its effect must be regulated by the intention of the parties, as expressed in the deed itself. The clause which is the subject of controversy is to be primarily regarded, although reference may be made to the context to explain any doubtful expressions in the clause; per Lord Eldon in Ker v. Duke of Roxburgh, 2 Dow. 149, and Appendix to Sandford on Heritable Succession. Then, in construing the clause in question, any thing ambiguous or doubtful in it must be interpreted against the obligor, for sibi imputet that he did not express his mind more clearly when it was in his power; Ersk. 3. 3. 87. Now, the effect of the destination is to make Mrs. Houston the absolute donee of the 3,000*l.* The auxiliary members of the clause are introduced for the purpose of regulating the term of payment in the various events for which provision was made. It was not necessary that the destination should have the words " heirs" or " executors and assignees." A bequest or obligation to a party may be made effectual by his executor.

If the leading operative destination gave Mrs. Houston a right of property, it would be for the respondents

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Appellant's Argument.

to show that there were other clauses in the deed which defeated or restrained the exercise of that right. The addition of a power of appointment could have no such effect, for, even though it were superfluous, if an absolute right of property was given by the leading clause, still the maxim would apply, utile per inutile non vitiatur. But the power was not useless, in the circumstances in which Mrs. Houston was at the time placed, and in reference to the different events provided for; because it may well have been supposed that the right did not vest in Mrs. Houston from the date of the deed, but only on the death of her husband without issue. It was, however, a leading object of the deed to give Mrs. Houston the power of disposal during her husband's lifetime. Again, even though Mrs. Houston's right was absolute, she could not have disposed of it by a deed inter vivos during her husband's lifetime without his consent. In this view also the power was necessary. Therefore on the clause of destination itself the interlocutor is wrong. But this conclusion is materially fortified by a consideration of the context, which uniformly refers to the 3,000*l.* as a provision to Mrs. Houston absolutely, and the consideration given by Mrs. Houston is made on that footing.

Respondents Argument.

Respondents.—As the provision in the postnuptial contract of marriage, according to its sound construction, gave to Mrs. Houston merely a faculty or power to uplift and dispose of, by a writing under her hand, the whole or any lesser part of the sum of 3,000*l.*; and as that faculty or power, which was personal to herself, was not exercised during her life, it lapsed on her

death, and the sum cannot be claimed by her next of kin.

Had it been the intention of the contracting parties to give an absolute and unqualified right of property in this sum to Mrs. Houston and her representatives, subject to no other condition except as regards the term of payment, Mr. Houston would have been taken bound to make payment of this sum to his wife, her heirs, executors, and assignees. Where such an object is in view, this is the usual and customary form in which the obligation is conceived.

The case has been dealt with by the Lord Ordinary as if the only point at issue were, Whether the right to this money vested or not? But this is truly a proper question of construction, in which the point of vesting forms a very subordinate ingredient. It was in Mrs. Houston's power to have uplifted the money at any time; and, after having been so reduced into possession, it would have been dealt with as any other portion of her personal estate. But this right would not (as the Lord Ordinary assumes) have passed to a second husband jure mariti, or been attachable by his creditors; for, unless he had been made special appointee, neither he nor his creditors could have touched it. His Lordship first considers the effect of the obligation to make payment to Mrs. Houston; and having arrived at the conclusion that, separately considered, it would have vested an absolute right in her, he treats the remaining portion of it as merely a means of enabling her more fully to exercise this absolute power over it. But the clause must be taken as a whole; and, in construing it, the House will look, not to what effect might be given

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Respondents Argument.

to each part of it, had it stood alone, but to the whole in combination; for, in this question of construction, the addition of the latter part of the clause implies a restriction and limitation upon the first. His Lordship assumes that, under a general clause of obligation to make payment to Mrs. Houston, and her heirs, executors, and assignees, at a period future and contingent, the right would not have vested till the contingency arrived. But this is an error in point of fact as well as of law. His reasoning proceeds upon the assumption of the fact that the right was held by trustees for her behoof. Now, as regards Mrs. Houston, the power of uplifting the money, or disposing of it, was conferred on her individually, free from control of trustees; and, again, as regards her husband, although Mrs. Houston's property was to be conveyed to trustees for certain purposes, it was expressly declared that the obligation to pay the sum of 3,000*l.* "shall only be per-"sonal on the said Alexander Houston;" and it was further declared, that it was to be "nowise real upon "the said trust estate itself." Further, his Lordship must have overlooked the distinction, in point of law, between an obligation which was conditional and one which, like the present, was only contingent; for, where there is an obligation to pay a certain sum of money to an individual, and his heirs and assignees, under a declaration that the term of payment is postponed to a future period, but contingent on an event which must happen, the provision vests in favour of the grantee from the moment of its execution.

Judgment deferred.

LORD CHANCELLOR.— My Lords, the controversy in this cause arises between the representatives of the wife and the representatives of the husband; and the question is, whether a sum of 3,000*l.*, which is the subject of a postnuptial settlement, in the event which has happened, of the husband dying first, and there being no issue of the marriage, vests in the representatives of the wife or vests in the representatives of the husband? The Lord Ordinary was of opinion that the estate of the wife was entitled. When it came before the Inner House, the learned Judges there were of opinion, that it belonged to the estate of the husband, and that the title of the wife had never become, under the terms of the settlement, absolute, so as to give her representatives a right to the sum of 3,000*l.*

This of course can only be ascertained from an accurate examination of the terms of the settlement. The obscurity has arisen from an attempt, on the part of the individual who framed the settlement, to express a great deal more within one sentence than one sentence was capable of bearing, so as to be sufficiently explicit, to ascertain the rights of the parties without difficulty.

Now, it is quite clear that there were four events contemplated: the death of the wife, leaving her husband surviving, or the death of the husband, leaving the wife surviving; these were two of the events. The two others would be either of those events happening, there being or there not being children; so that there were four contingencies that the parties had evidently in contemplation.

Having those four events in contemplation, the provision was expressed in these terms: in the first place

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

an annuity of 400*l.* a year was provided for the wife for her life, and there was this proviso added, that in case the wife "should at any time during her life uplift the "sum of 3,000*l.* sterling therein provided to be paid to "her in manner herein-after mentioned, or any part "thereof, then and from thenceforth the said annuity "of 400*l.* sterling, provided to the said Mrs. Helen "Houston, as said is, should suffer such a restriction "and abatement as should be equal to the legal in-"terest for the time of the sum so to be uplifted by "her."

Then comes the covenant by the husband as to the 3,000*l.* [His Lordship read the clause as above quoted.] Certainly, on reading that clause there is great confusion, apparently, in the construction of it, and a great variety of events are contemplated, which are endeavoured to be provided for in the same sentence.

Now, my Lords, the parties not only had those four events to provide against, but they evidently had in contemplation, that, although the enjoyment of the 3,000*l.* was postponed, the wife, during the life of the husband, should have the power of bestowing the whole or any part of that sum upon any person she might please; and it was necessary, therefore, to provide that she should have that power, for, although it may be that she might by will have had that power without any special provision, she could not have had it, except with the consent of her husband, by any deed executed inter vivos. It was necessary therefore, in order to give to the wife that power over the property which the parties evidently intended her to have, that there should be an express

provision in the settlement that she should have the power, during the life of the husband, of giving a future interest in the property in question to any person she might please. There were, therefore, these four events to be provided for, and there was also a power to be reserved to the wife of disposing of the principal, or any part of it that she might please, during the time of coverture.

These several provisions, if they had been provided for in different clauses of the settlement, would, no doubt, have been expressed in very different terms from those which we find upon the face of this deed; but the framer of the deed has endeavoured to express all under one provision, and from thence, as it appears to me, has arisen the obscurity.

But the mode of dealing with a case of this sort is, first of all, to look at the event which has happened, and then to see whether that part of the deed which is in question in the present discussion does or does not embrace within itself the means of ascertaining the intentions of the parties in that particular event; if that be sufficiently clear, it is not material whether the other events, which have not occurred, are or are not provided for with a degree of obscurity which, if those events had happened, might have created considerable difficulty as to the construction of the settlement.

Now, the event that has happened is the death of the husband, living the wife, and there being no issue of the marriage, I have only to call your Lordships attention to the different provisions to be found in this instrument relative to that state of circumstances; and the question for your Lordships will be, whether there

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

are not to be found upon the face of this instrument sufficient words of gift to the wife, in the event which has taken place?

My Lords, in calling your attention to the first part of this settlement, I shall read it, divested, as far as possible, of the other provisions for contemplated events which have not taken place. It begins by the husband binding himself to make payment to the wife of the sum of 3,000*l.* sterling money, at the first term of Whitsunday or Martinmas next after the death of the husband, if he shall predecease her without leaving issue of the marriage. All those words are to be found in the sentence; they are mixed up, it is true, with other words, which other words contemplate other events, but those words are to be found upon the face of the settlement, and those words contemplate the event which has taken place.

Now, those words, if they stood by themselves, would leave no doubt or ambiguity whatever, because they are so expressed as to be amply sufficient to bestow upon the wife, in the event which has happened, namely, her surviving the husband without issue, the sum in question.

Then, is any ambiguity thrown upon this intention by the different parts of this instrument? There can be no ambiguity thrown upon this gift by the provisions made for other events that have not taken place; or, if there were any ambiguity from those provisions in contemplation of other events, it must be of a very cogent nature, in order to destroy the effect of the terms which are found in this part of the deed. But I do not find that there are any words

which throw any doubt upon the intention of the parties in contemplating the event which has happened; but, on the contrary, I find very distinct provisions in this deed, which very much confirm this construction of the deed, and to my mind leave no doubt of that being the intention of the parties; for I find in a subsequent provision these words: "that it shall "not be in the power of the wife, or the persons to "whom she shall appoint the sum of 3,000*l.*, or any "part thereof, to be paid, to uplift the same during "the life of Alexander Houston, or even after his "death, during the joint existence of Mrs. Helen "Houston and the issue of this marriage." That contemplates, therefore, the wife being entitled; but in case of there being children of the marriage, it provides that during the lives of those children the wife shall not have the power of uplifting the 3,000*l.*, but after the expiration of the lives of those children it is a necessary inference that that power was to exist in her of uplifting.

But that is not so strongly expressed in this part of the sentence as it is in the following, where it is said, that in case the wife "shall happen to survive her hus-"band and the issue of the marriage, and shall ask and "recover payment of all or any part of the sum of "3,000*l.*, then and from thenceforth" her annuity shall suffer diminution to that extent.

Now that contemplates the precise event which has happened. It contemplates the wife surviving, and there being no issue of the marriage; and in that state of circumstances, which is the precise state of circumstances which has happened, it assumes that she would have the power of asking for and recovering that 3,000*l.*

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

or any part of it; and all that it provides is this, that in that event, that is, if she shall think proper to ask for and demand that 3,000*l.*, or any part of it, then the 400*l.* a year, which she was entitled to for life, shall suffer a diminution equal to the amount of the interest of the sum she shall so recover.

Now, although the party contemplated that if the wife survived, and there should be no children, she should have a right to the 3,000*l.* or any part of it, that she should not exercise that right and demand payment was very natural, because she had 400*l.* a year during her own life; and unless she had some occasion for the employment of the capital, her income would not be benefited by applying for the 3,000*l.*, or any part of it, because she could not apply for the 3,000*l.*, or any part of it, without sustaining a corresponding diminution in her income of 400*l.* a year. It was very natural, therefore, that, unless some particular occasion had occurred which made her wish to have control over the capital, she should leave the fund in the state in which her husband had left it, namely, as a charge upon his property, she receiving an income which would not be increased by the receipt of any part of the 3,000*l.*

But then the words "any part of it" were very much relied upon in the argument. It was said, that it is clear that this party contemplated her exercising some powers by which she was to receive part of the 3,000*l.* It is obviously necessary that those words should be introduced, because the object was not only to give her power over the whole, which would include a power over any part, but it was contemplated that she might, during her husband's lifetime, have exercised the power which the instrument gave her of transferring her right

to part of the sum to somebody else, and the individual, therefore, to whom she might transfer her right to part, would be entitled to demand, not the 3,000*l.*, but to demand so much of the 3,000*l.* as he obtained through the power that was so reserved to the wife. It appears to me, therefore, that the introduction of those words refers to those who might claim through the wife, or to the wife herself, in the case of her demanding only part of the 3,000*l.* If she thought proper to demand only part, then, of course, her annuity of 400*l.* a year would be diminished, not by the interest of the whole 3,000*l.*, but by so much as she might ask for and demand of it. She might ask for 1,000*l.* out of it; the 1,000*l.* might be paid, and of course the annuity would then be diminished by the amount of the interest of 1,000*l.*, and not by the amount of the interest of 3,000*l.* Those words, found in the instrument, therefore, do not at all appear to me to shake the construction of what is to be found in the instrument, as applicable to the event which has taken place.

There are, certainly, to be found in this deed terms of gift directly applying to the case which has occurred; and when there is found upon the face of an instrument a clear and distinct expression of the intention of the party, those terms of gift are not to be superseded by ambiguities, not having reference to the particular state of circumstances which has occurred, but to other events which have not occurred, and which therefore call for no decision.

For these reasons I am of opinion, that the construction put upon this instrument by the Lord Ordinary was correct, and that the construction put upon it by the Inner House was not correct. I shall, therefore,

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Judgment.

move your Lordships to reverse the interlocutor appealed from, and in its place to substitute the interlocutor pronounced by the Lord Ordinary.

The House of Lords ordered and adjudged, That the said interlocutor, complained of in the said appeal, be and the same is hereby reversed.

G. & T. W. WEBSTER — RICHARDSON and CONNELL, Solicitors.

[*8th June* 1841.]

THOMAS SCOTT of Abbottsmeadow, Appellant.[1] (No. 12.)

[*Sir W. Follett — James Anderson.*]

Messrs. CURLE and ERSKINE, Writers in Melrose, Respondents.

[*Lord Advocate (Rutherfurd) — Pemberton.*]

Process — Practice in Bill Chamber — Sheriff's Process — Caption — A. S. 17th Jan. 1797 *— A. S. 14th June* 1799 *— A. S. 11th July* 1828 *— A. S. (Sheriff Courts) 11th July* 1828, *c.* 19. *sect.* 4.—In an advocation from a Sheriff Court the bill was passed, but the advocator did not expede the letters till after the expiry of ten days. The opposite parties obtained a certificate of that fact from the Signet Office. The advocator, who had borrowed the process from the sheriff clerk on a receipt to return the same on demand, delayed returning it to the clerk, and thereafter expede letters of advocation, which he called in Court, and placed the process in the hands of the clerk to the advocation in the Court of Session. The Lord Ordinary, the Court adhering, dismissed the advocation. The advocator having been imprisoned under a sheriff's process-caption, obtained upon the application of the opposite parties, brought an action of damages against them: Held, assuming the said certificate to have been regular, (affirming the judgment of the Court of Session dismissing the action), (1.) That, in consequence of the letters of advocation not having been duly expede, there was no depending process in the Court of Session: (2.) That the party advocator was bound to have returned the inferior

[1] Fac. Coll., 2 D., B., & M.

court process to the sheriff clerk, to be by him transmitted to the clerk of the bills; it being observed by the Lord Chancellor, that a party borrowing a process in a Sheriff Court, on a receipt to return the same on demand, and depositing it in the Court of Session, cannot be permitted to plead the possession of the Court of Session as a reason why he should not obey the order of the proper court.

Amendment of the Libel. — In a summons of damages for the alleged illegal and malicious use of a sheriff's process-caption, it was stated, narrative, that the writ was "under "the hand of the sheriff clerk," and that the whole proceedings were illegal, &c. Held (affirming as aforesaid), that, although the record was not closed, an amendment of the summons ought not to be allowed, to the effect that the said "caption was not issued by the sheriff, nor was "it an extract of any warrant duly signed by him," except on payment of the previous expenses.

Practice in Bill Chamber — A. S. 14th June 1799. — Question as to the regularity of a certificate that letters of advocation had not been expede, the bill having been passed on the 13th August; the certificate bearing, that from the 22d August till the 3d September inclusive no such letters had passed the signet. (See p. 323.)

Costs. — The House of Lords will not allow an appeal in respect of costs. (See p. 324.)

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

THE appellant, a procurator in Roxburghshire, presented an application to the sheriff of that county for the delivery of certain title deeds by the respondents. The application having been refused, the appellant advocated, and the bill was passed in common form on 13th August 1836. Letters of advocation were not expede within the ten days, in terms of the act of sederunt, 14th June 1799, sect. 5. The passing of the bill was held, as intimated by the respondents, on the 24th of August. The respondents thereafter

obtained a certificate by the substitute keeper of the signet, which bore the dates and was in the terms following:—"Searched the signet books from the "22d day of August last to the 3d day of September "current, both days inclusive, and found no letters of "advocation there entered as having passed the signet "during the above period, at the instance of Thomas "Scott, of Abbotsmeadow, against Messrs. Curle and "Erskine, writers in Melrose, and Mrs. Erskine, residing "there. Signet Office, 3d September 1836."

The respondents, on 7th September, wrote to the appellant to return the sheriff court process, which stood borrowed on his receipt to return the same when demanded; and this request not being attended to, caption was marked and issued in common form. The appellant admitted, in answer to the respondent's letter of the 7th September, that the process was in the hands of his Edinburgh agent, and that he would request that it might be lodged in the Bill Chamber; and he afterwards admitted that he had lodged the process in the Bill Chamber with the bill, and thereafter had it transmitted to the clerk of the process in the Court of Session, in whose hands it was at the date of his apprehension on a process caption, as after mentioned.

The appellant, on 26th September, expede letters of advocation, which, upon the meeting of the court, he called and enrolled in absence of the respondents; who, however, appeared at the bar when the cause was called by the Lord Ordinary (Corehouse), and objected to the competency, on the ground that the letters had not been duly expede, and which objection his Lordship, on 20th December 1836, sustained.

Scott v. Curle and another.

8th June 1841.

Statement.

The process not having been returned to the sheriff clerk, a caption was enforced, and the appellant was imprisoned in Jedburgh Castle upon the 23d December. He presented a bill of suspension and liberation on the 24th December, and produced a certificate of the same date by the "clerk of process," bearing, that the process was then in his (the clerk's) custody, "being at present "in dependence in the Court of Session;" and the Lord Ordinary (Cockburn) forthwith granted warrant for the appellant's liberation. A reclaiming note was thereafter lodged by the appellant against Lord Corehouse's interlocutor of the 20th December, which the Court, on 26th May 1837, refused.

The appellant (13th May 1837) brought an action of damages for wrongous imprisonment against the respondents, stating in his summons that the process was, at the time of his apprehension, subject to the order of the Court of Session, and not of the sheriff; and that he had been apprehended "in virtue of a pro-"cess-caption under the hand of the sheriff clerk of Rox-"burghshire;"—proceedings which he subsumed were illegal, malicious, and injurious. The respondents in defence pleaded, that, the advocation never having been a depending process, it was competent to proceed in the sheriff court as if the bill had been refused, and illegality and malice were denied. The record having been prepared, but not closed, and the cause remitted for the preparation of issues, it was re-transmitted, upon the motion of the respondents, to the Court of Session roll, to have the question of law, raised by the defences, disposed of previous to trial.

The Lord Ordinary (26th November 1838) ordered minutes of debate on the points of law or relevancy,

Scott v. Curle and another. 8th June 1841.

and by a subsequent interlocutor (7th December 1838) allowed the appellant to give in a minute stating an addition to the record, to the effect that the "caption "was not signed by the sheriff, nor was it an extract of "any warrant duly signed by him," and a relative plea in law. When the minutes of debate were given in, the Lord Ordinary (9th November 1839) made avisandum therewith to the Court, expressing the inclination of his opinion in a note, that "the new plea "cannot be entertained under this summons."

Statement.

Judgment of Court, 18th Jan. 1840.

The Court (18th January 1840) pronounced the following interlocutor: — "The Lords, having advised "this process and minutes of debate, and heard counsel, "remit the cause to the Lord Ordinary, to close the "record and sustain the defences, and to decide as to "expenses of process as to his Lordship shall seem fit, "and decern, reserving to the pursuer to institute a "new action, if he shall be so advised."

Mr. Scott appealed.

Appellant's Argument.

Appellant. — 1. There is raised on the record a bonâ fide case of malice and oppression, in the use of a process-caption served irregularly by a sheriff clerk, while the proceedings were actually part of a depending suit in the Court of Session. The effect of the passing the bill and of the subsequent procedure was, to bring the inferior court proceedings under the control and jurisdiction of the superior court, so as no longer to be subject to the order of the sheriff; and as the process was in the hands, first, of the Bill Chamber clerk, where the respondents might have borrowed it, and thereafter of the clerk to the advocation in the Court of Session, this was not a case where the proviso of

Scott v. Curle and another.

8th June 1841.

Appellant's Argument.

the A. S., 17th January 1797, and more recent sheriff court A. S., 1828, c. 19, sect. 4, were imperative, as to the process being returned by the party borrowing it to the sheriff clerk, to be transmitted by him to the clerk of the bills.

Although, strictly, the letters of advocation must, by A. S., 14th June 1799, be expede within ten days, yet, in practice, the period from which the time runs[1] is not precisely understood or acted on; and as the respondents held the passing of the bill as intimated after the lapse of the ten days, and withheld from the appellant all knowledge of the obtaining of a certificate, they acted in malâ fide. At any rate the appellant was clearly entitled to discuss the question of the competency of the advocation, which, from the informality of the certificate and otherwise, might have been sustained; but till it was disposed of by the Lord Ordinary and the Court, it was as much a depending process as any other advocation then in Court; and so the Lord Ordinary must have held, as by his interlocutor he "dismissed" the process, thus showing that there had been a process before him.

2. The summons, which sets forth the signing of the process-caption by the sheriff clerk and the illegality of the proceedings, is broad enough to let in a claim for damages, on the ground that the caption was not signed by the sheriff. The relevancy of a claim to damages on this ground will not be disputed after the case of Landell v. Brodie or Landell.[2] At any rate, the record not being closed, an amendment of the libel

---

[1] Beveridge on Bill Chamber, pp. 90—94.

[2] 26th Jan. 1838, Fac. Coll. See also Stair, 4. 47. 23; Bell, Dict. & Dig. p. 127; Maclaurin, Form of Process, p. 55; M'Leod v. Hill, 16th Nov. 1826, 5 S. & D. 1; Horne v. Steele, 18th Feb. 1825, 3 S. & D.

ought to have been allowed, reserving all the question of expenses.[1]

Respondents.—1. The terms of the A.S., 14th June 1799, sect. 5, as renewed by the Supreme Court, A.S. 11th July 1828, sect. 17 and 18, show that, ten days having elapsed before the letters were expede, the advocation fell to the ground, and that the respondents, upon obtaining the certificate after the lapse of that time, were at liberty to go on with their diligence or other proceedings, as if the bill had been refused.

[*Lord Chancellor.*—How does it happen that this certificate does not bear, that the letters were not expede within ten days from the passing of the bill, that is to say, from the 13th to the 23d of August, but only certifies the fact after the 23d of August?]

The certificate may in that respect be defective, but the fact of letters not having been expede within the prior period is admitted; and if otherwise, no certificate would have been issued. Besides, this has been disposed of by the Court, by a judgment not appealed from.

There being no depending process, therefore, the appellant was not entitled at his own hand to keep up the inferior court proceedings, which were more properly lodged by him in the Bill Chamber, as the A.S. 11th July 1828, sect. 9 and 10, require.

2. The summons was not so libelled as to let in the claim for damages on the ground of the objection to the process-caption, and the Court exercised a wise discre-

---

550; Livingstone v. Beveridge, 24th Nov. 1831, 10 S. & D. 52; Dunlop v. Hay, 14th Nov. 1822, 2 S. & D. 11; Pagan, 14th Feb. 1835, 13 S., D., & B. 471.

[1] Inglis & Company, 9 S. & D. 199; Anderson v. Main, 20th May 1835, 13 S., D., & B. 807.

Scott v. Curle and another.

8th June 1841.

tion, and acted consistently with its approved practice, under the judicature act, in not allowing the proposed amendment of the libel.[1]

Ld. Chancellor's Speech.

Lord Chancellor. — My Lords, in this case, at the time of the hearing, I felt no doubt, except on one point, that of the form of the certificate mentioned. With respect to the rest of the case which has been brought before your Lordships by the appellant, it did not create one moment's doubt. The interlocutor of the Court of Session remitted to the Lord Ordinary to dismiss the action, with power to decide as to expenses, the Court being of opinion that the pursuer (appellant) was not entitled to the relief he prayed. The only other judgment the Court could have pronounced would have been to allow the amendment under the penalty of previous expenses. But the Court, at the same time, while it dismissed the action, gave him the liberty of commencing a new action, if he should be so advised. This really, therefore, is a case that resolves itself into a question of costs, though it does not assume that shape. Your Lordships do not allow an appeal in respect of costs[2]; but where the same question is presented in another shape, your Lordships are under the necessity of hearing a discussion on a question as unimportant between the parties as if it had been presented as a mere question of costs.

The contest between the parties arose out of a summary application in the Sheriff Court, from which the appellant presented to the Court of Session a bill of advocation. There is no doubt that that bill of advo-

[1] Shaw's Digest voce Process, p. 371. nos. 27. 41. 54. 58. 65. 92.

[2] Clyne's Trustees v. Dunnett, M'L. & Rob. App. p. 28; Earl of Strathmore v. Paul and others, 1 Rob. App. 217.

cation fell to the ground, unless a certain step was taken by the appellant within ten days; that is to say, at the expiration of ten days, according to the construction which has been put on the act of sederunt, it was competent for the opposite party to put an end to the proceeding, if that process had not taken place. More than ten days did elapse. The respondents then applied for a certificate, which certificate was in these words. [His Lordship read it.] There is no doubt that upon ten days having elapsed, and the proper certificate being obtained, according to the act of sederunt, the advocation was actually gone,—it no longer existed. The terms of the act of sederunt[1] are, "that the other party "may go on with his diligence or other proceedings as "if the bill had been refused."

After that, however, the appellant proceeded as if no such step had been taken to put an end to the bill of advocation. He expede the letters, and brought the advocation first before the Lord Ordinary; and after the Lord Ordinary had decided, on this very ground, that the certificate of lapse of time put an end to the suit, he thought proper, not being satisfied with the Lord Ordinary's decision, to bring the case before the Court; and the Court, of course, adjudged in the same way as the Lord Ordinary had done. It is said, however, the appellant having possessed himself of the Sheriff Court process, and placed it in the hands of the clerk to the advocation process, that the advocation was still a depending process, and that the pendency of the advocation prevented the respondents taking any proceeding in the Sheriff Court. That would be a very strange view to be taken of the case, if the act of sederunt put

[1] A. S. 14th June 1799, sect. 5.

Scott v. Curle and another.

8th June 1841.

Ld. Chancellor's Speech.

an end to it completely, and enabled the party who had got the certificate to go on with the proceedings in the Sheriff Court. There is no question about the construction of this act of sederunt. If, then, an advocation is actually out of Court by the lapse of the ten days, there being no farther opportunity of preventing the opposite party going on in the Sheriff Court, an advocator thinks proper to institute so useless a proceeding as to apply to the Lord Ordinary in the first instance, and the Court afterwards, that cannot be considered as a pendency of the process in favour of the party who has gone on prosecuting the advocation, assuming the proceedings to be regular, after the expiration of ten days, and after a certificate granted to the opposing party, which, by the terms of the act of sederunt, put an end to the cause. It may be assimilated, according to our course of practice, to the case of the Court of Chancery dismissing a bill; the plaintiff is actually out of Court, and if he thinks proper to give notice of a motion in that cause, if he comes before the Master of the Rolls or the Vice Chancellor, who must necessarily give judgment against him on the motion, on the ground that the suit is no longer in existence, and if the party, notwithstanding that, brings the matter by appeal before the Lord Chancellor, who must necessarily decide that that suit is ended, can such person say that the suit was pending? Certainly not, nor can the appellant be heard to contend that this advocation was pending, because he has chosen to take these proceedings, contrary to the act of sederunt. It is impossible to contend that that is a pendency of a process, for the purpose of preventing the party who, by the act of sederunt, had a right, on the certificate being granted, to take the course he did.

The respondents having armed themselves, as I have stated, with the certificate, in terms of the act of sederunt, proceeded in the Sheriff Court; and having found that the proceedings, which ought to have been in the hands of the sheriff clerk, were somehow in the possession of the appellant, having been procured by him from the Sheriff Court, they applied to have them restored. They were not properly in his possession, and ought not to have remained in his possession; and it is quite clear he had no right to use the possession he so obtained from the Sheriff Court for the purpose of expeding letters of advocation. The mode of proceeding is very clearly pointed out; he ought to have restored them to the Sheriff Court, having borrowed them for a particular purpose. He did not deny that he was bound to deposit them in the Sheriff Court, but, contrary to the purpose for which the documents had been entrusted to him, and contrary to the act of sederunt, he brought these proceedings into the Court of Session; at least so he states, and that may be assumed, for the present purpose, to be a correct representation. But there is another fact which he does not dispute, for it appears from his own minute of debate, namely, that on the 7th of September, those documents were in the possession of his agent in Edinburgh.

He is then called upon, by proceeding in the Sheriff Court, to bring in these documents; he does not do so; he states no reason for not doing so, but afterwards deposits them in the Court of Session. Now, if a party is entrusted with documents in the Sheriff Court, under an obligation to return them to the clerk of the Sheriff Court when called upon to do so, and he afterwards thinks proper to deposit them in the Court of Session or elsewhere, he cannot be permitted to plead the pos-

Scott v. Curle and another.

8th June 1841.

Ld. Chancellor's Speech.

session of the Court of Session as a reason why he should not obey the order of the proper Court. That, however, was the course taken. After repeated applications, having deprived himself of the means of obeying the order of the Sheriff Court, by having deposited the document elsewhere, (at least so he alleges,) he is arrested under process of the Sheriff Court for not obeying the order of that Court; and then he gets liberated, and for that arrest he brings his action of damages; and these facts are stated by himself. He also states, not as the statement of a grievance, but in the course of the narrative, that he was apprehended, on the 23d Dec. 1836, by a process-caption "under the hand of the she-"riff clerk of Roxburghshire;"—not, I say, stating that as a grievance, but narrating it as part of the transaction. Now, that process-caption is said not to have been regular, in respect it was signed by the clerk, and not by the sheriff. That objection the Court of Session, on the case being brought before them, did not dispose of. They did not think the summons stated that as a ground of action, which it clearly did not, but as a part of the narrative, and they held, that if the party meant to state that as a specific ground of action for his arrest, he ought to have distinctly libelled it as such, and therefore the Court adopted a course which preserved to the party complaining of the arrest all the benefit he might be entitled to in consequence of any defect in the process-caption, by giving him liberty to bring another action on that ground, if he thought proper; but it refused him an opportunity to amend his pleadings, by introducing a new grievance as a ground of action. Now, the action proceeded on a totally different ground. His alleged error in the process-caption not having been brought forward, and stated as a ground of com-

plaint, but merely incidentally stated as one among other circumstances, it would certainly have been a very inconsiderate exercise of discretion for the Court to have permitted the amendment to have been made. It was for the Court to determine the question of relevancy or competency, and the Court being of opinion, in which it appears to me clearly that they were right, that that was not a complaint stated or relied upon in the summons, the permitting a party to amend the record, for the purpose of bringing forward some new case, would have been an act of injustice towards the other party. The Judges felt that they could not permit a record framed for one purpose to be turned to another, and therefore they dismissed the action of damages, but at the same time, while they dismissed the action, they left him at liberty to bring another, if he thought proper. Now, the expenses must have been paid at all events; if the amendment had been permitted, the expenses must have been paid up to the point when the action was allowed to proceed on a new ground; so that, regarding it, simply, as a question of expenses, the effect of the action being dismissed (with expenses), with liberty to bring a new action, would be precisely the same in every respect, except that in the one case the party would have to pay expenses up to the period of the amendment, and in the other to pay the expenses of the action so dismissed.

The only point, on which I yesterday entertained any difficulty, was as to the form of the certificate. I did not receive any explanation, why, the bill of advocation having passed on the 13th of August, the search is stated to have been from the 22d day of August, and finds that there was no bill of advocation at that period.

Scott v. Curle and another.

8th June 1841.

Ld. Chancellor's Speech.

Why it was that the information was not required for the period previous to the 22d, the day stated in the certificate, I do not understand; but there is in the appellant's case (p. 4.) a passage cited from Mr. Beveridge[1]: "It may be noticed, that in practice the ten days have "been reckoned heretofore, not from the date of the "interlocutor passing the bill, but from the date that "the bill so passed is issued, or in a state to be issued, "by the clerk to the bills." Whether that is the period to which the date refers or not, there has no satisfactory explanation been given, but in the same page of the appellant's case there is a passage, which appears to me to remove the difficulty arising from the doubt as to the period to which the certificate refers, for it is there stated, "that if the letters should be expede before the "certificate is issued, although beyond the ten days, "the proceeding is quite effectual; in fact the keeper of "the signet would not issue a certificate if, before such "certificate was applied for, the letters were actually "expede, although after ten days." The only difficulty that arises upon the terms of the certificate is the possibility that in the interval between the 13th of August and the 22d of August letters of advocation might have been signeted. But that is entirely excluded by the statement of the appellant himself, that, on the application to the officer for the certificate, though more than the ten days had elapsed, he would not have granted the certificate applied for, if, even after the expiration of the ten days, letters of advocation had been expede before the certificate was applied for. Now, that appears to remove the possibility of there having been such

[1] Treatise on Bill Chamber, p. 90.

letters expede at the time the certificate was granted, and in point of fact there is no statement that there were such letters expede at any time between the 13th of August and the 22d.

This, however, was a question for the parties before the Lord Ordinary in the original suit, because, when that cause came before the Lord Ordinary, if this bill of advocation was gone, if there had been no duly expede letters of advocation, of course it was competent, to the party contending that the bill of advocation was gone, to raise that as an objection, and to apply for the dismissal of the process; and it was competent for the other party to insist on the irregularity of the certificate, if any such objection could be made; and then it would have become the duty of the Lord Ordinary or the Court to decide on the regularity of the proceeding; and if there was no certificate, in consequence of which the suit was necessarily ended, it would be matter of discretion for the Lord Ordinary or the Court to determine what course should be pursued. But neither on the one occasion nor the other do we find any question raised on the ground of a supposed irregularity of the certificate. It is, therefore, a case in which the whole effect of the certificate remains, and this certificate must be assumed to be a regular certificate in the absence of any authority to show that it is irregular. The case having been four times before the Court of Session, twice before the Lord Ordinary, and twice before the Inner House, and that objection not having been made, it would be too much for your Lordships to assume, in a question of practice, that there is any thing, in substance, in that which appears, certainly, not perfectly explained.

Scott v. Curle and another. — 8th June 1841. — Ld. Chancellor's Speech.

If then that is a valid certificate, the proceeding in the former action was gone at the time the letters of advocation issued, and all further proceedings were null and void, and so the Court said whenever the question came before them. Whether the respondents were correct in their proceedings in the Sheriff Court, or whether there was any defect in the process-caption, is a question which may be tried, if another action is brought. It is quite sufficient that this action of damages has failed on all the grounds on which it was brought, and therefore the interlocutor of the Court of Session was perfectly correct in dismissing that action, and directing the pursuer to pay the expenses, leaving him at liberty to bring another action, if he thought fit. Under these circumstances, my Lords, I submit that the interlocutor appealed from should be affirmed, with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, therein complained of, be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the said costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

J. W. Nicholson — Spottiswoode and Robertson, Solicitors.

[*8th June* 1841.]

CHARLES TODD, Merchant in Glasgow, Appellant.[1] (No. 13.)

[*Lord Advocate* (*Rutherfurd*).]

HENRY DUNLOP, Lord Provost of the City of Glasgow, and others, Trustees for improving the Navigation of the River Clyde and enlarging the Harbour of Glasgow, Respondents.

[*Attorney General* (*Campbell*).]

Property — River. — Held (affirming the judgment of the Court of Session), that a party whose predecessor obtained from a corporation a feu right to land adjacent to, and described in his feu contract as bounded on the north by, a public river, has no right of property in ground afterwards gained from the channel of the river by the operations of the corporation, as trustees in improving the navigation of said river.

Observed, per Lord Chancellor: The case is ruled by that of Smart v. Magistrates of Dundee, affirmed by the House of Lords, 22d November 1797 (8 Brown's Cases in Parliament, p. 119), where it was held that "where "the sea flood is stated as the boundary of premises "granted on the shore of a sea-port, being an incor- "porated burgh, this does not give the grantee a right to "follow the sea, or to land acquired from it, or left by "it where it has receded, in prejudice to the corporation "having a right vested in them to the whole territory of "the burgh."

---

[1] Fac. Coll., 23d Jan. 1840; 2 D., B., & M.

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

BY statutes 32 Geo. 2. c. 62., 10 Geo. 3. c. 104., and 49 Geo. 3. c. 74., the lord provost, magistrates, and town council of Glasgow were appointed trustees for improving the navigation of the river Clyde, and were authorized to cleanse, enlarge, and improve the said river, to make and keep it more passable for shipping, to erect all necessary walls and other works, and "to "alter, direct, and make, or cause to be altered, directed, "and made, the channel of the said river through "any land, soil, or ground," part of the then bed of the river.

By the 6 Geo. 4. c. 117. certain other trustees were added to the magistrates and council; and besides the authority in the former statutes, they were authorized to make new and additional walls. In section 2. of that statute there was this reservation: — "reserving "always to the proprietors of lands adjacent to the "river all rights to soil acquired from the said river, "or other rights competent to them at common law." By sect. 5. of the same act it is declared, "that where, "by the formation of any jetties, connecting dykes, or "other works under or by virtue of the said recited "acts or of this act, the access to the river, previously "enjoyed by the owner and occupiers of the lands "adjacent thereto, is or shall be impeded or obstructed, "the said trustees shall leave or form such openings in "the said jetties or connecting dykes, and also shall "form such roads upon or along such jetties or dykes, "at suitable and convenient distances, for such owners "and occupiers, as may afford them equally free and "easy communication at all times with the river, for "the watering of cattle, and for the landing, embark-"ing, and carting manure, farm produce, and other

"articles; which openings and roads shall be kept "clear, and in good and sufficient repair, by the said "trustees, at their expense in all time coming."

In 1792 John and David Todd acquired, under a feu-contract from the city of Glasgow, a piece of ground on the south side of the Clyde, and below the Broomielaw. It was described as "consisting of one acre one "rood and thirty falls of ground, or thereabout, in "which measure both parties acquiesce, be the same "more or less;" and as "bounded on the east by the "said continued road or passage, on the north by the "river Clyde, on the west by Sheilsburn, and on the "south partly by the property of the said John and "David Todd."

The ground conveyed to David and John Todd by the feu-contract of 1792 afterwards came by progress into the person of the appellant, and continued to belong to him, with the exception of certain portions thereof, which he sold, in 1833 and 1837, to Thomas Wingate.

Subsequent to the date of the feu-right in 1792, the channel of the river Clyde was contracted, as the trustees averred, solely in consequence of artificial embankments and other operations performed by them and their predecessors, who, with the view of improving the navigable channel, erected embankments and built retaining walls on each side, by which the transverse section of the river was greatly lessened or contracted, and afterwards filled up the space between the wall on the south side of the river and the appellant's ground, so as to form a new tract of land; these operations, by which ground was taken from the bed of the river opposite his northern boundary, having been carried on

TODD v. DUNLOP and others.

8th June 1841.

Statement.

within a recent period, and all performed by the trustees for the purposes connected with the navigation of the river. The appellant admitted that the last operation, whereby a large pool opposite his property was filled up, took place about the year 1826; but he alleged that the new ground was acquired partly by alluvial deposits, and partly by his own operations, as the proprietor of the adjacent land, as well as by those of the trustees.

The river trustees (respondents) having resolved to restore the channel of the Clyde to its former width, by cutting away the ground so gained on Mr. Todd's (the appellant's) northern boundary, the appellant, with a view to compensation, brought an action of declarator against the respondents, in the Court of Session, concluding, "And it ought and should be found and "declared, that the river Clyde forms the northern "boundary of the said subjects belonging to the pur-"suer as aforesaid; and that, under the servitudes or "burdens foresaid, the pursuer possesses and is entitled "to the full and absolute property of the subjects "down to the said river, and of the whole ground "extending to the said river, without distinction as to "whether the said ground formed part of the subjects "at the date of their original acquisition, or has since "been gained in consequence of the river having "receded, or its channel having been contracted or "narrowed, or of any operations employed for the "purpose of so contracting or narrowing the said "channel, or in connection therewith; and that, subject "to the servitudes or burdens foresaid, the pursuer is "entitled to exercise the whole rights of absolute pro-"prietor over the whole of the said ground, and to

" sell, dispone, alienate, and convey the same, as full " and absolute proprietor thereof."

The respondents, in defence, pleaded inter alia that the ground in dispute having been recently taken from the channel of the river by artificial means and operations, with a view to the improvement of the navigation, did not accresce or belong to the pursuer (appellant).

A record having been made up and closed, the Lord Ordinary ordered cases, with which avizandum was (11th July 1839) made to the Court, his Lordship stating his views of the whole cause in a note in the terms subjoined.[1]

---

[1] " *Note.*—This case, like all others which turn upon principles and " interests so large, and (if the epithet may be allowed) expansible, is " not unattended with difficulty; but the Lord Ordinary is of opinion, " that the weight both of principle and of authority is with the trus- " tees for the navigation.

" It is a long and by no means an easy step, from the case of gradual " and imperceptible accession, by the action of natural causes, to great " and sudden acquisitions of additional land, by artificial operations of " the acquirer himself; but it is a still greater and far more difficult " step, from this last, to the allowance of such acquisitions to an inactive " proprietor, when these have been obtained by the artificial operations " of a third party, and most of all by the operations of a public statu- " tory board, performing them (tentatively or permanently) for the " improvement of a local navigation, and met, when afterwards pro- " ceeding to remove them, in the discharge of the same duty, by a claim " on the part of the alleged (gratuitous) acquirer.

" Whatever other difficulties may be in the case, the Lord Ordinary " has no idea that the pursuer can ever make good, against such " defenders, the broad and sweeping right he asserts 'to follow the " 'river' to whatever distance it may be carried, because his property is " described in his titles (though they limit him to a precise measure- " ment by roods and yards) as bounded by that river. To show the " fallacy of this proposition, it is only necessary to consider to what " consequences it would lead. By the statutes the trustees have power " not only to deepen, widen, or contract the channel of the river, but " also to 'straighten, direct, or alter its course.' But suppose that in the " exercise of this power (and to avoid a long bend like those on the " Forth) they had thought fit to carry the channel of the river quite " away from its former bed opposite to the pursuer's ground, and to " lead it through a new cut three or four hundred yards further off,

TODD v. DUNLOP and others.

8th June 1841.

Statement.

The Lords of the Second Division afterwards heard the cause argued in their own presence by one counsel

---

" thus interposing between him and the actual stream a large tract of " land (twenty or thirty acres, it might be, in extent), would the pursuer " be entitled to take to himself the whole of this interjected territory, in " virtue of his alleged right to have the river, at all events, for his boun- " dary, and consequently to follow it wherever it went? The notion is " evidently extravagant; but the pretension might lead to still greater " absurdity. His titles, he says, gave him an inalienable right to have " the river for his boundary 'on the north.' But suppose the trustees " had found it necessary to divert its course in an opposite direction, and " to carry its channel some three or four hundred yards to the south of " the pursuer's acre and half of ground, what would become of his north " river boundary then? Or how would he proceed with his claim to all " the land between him and the river on the south?

" The propositions in law at the bottom of page 15. of the defenders " case, and the illustrations beginning at the middle of page 19, seem " to the Lord Ordinary to admit of no answer. Some others, however, " to the same effect, have occurred to him. Suppose that, instead of " closing in their retaining wall up to the land at each end, the trustees " had left it open, and, for the sake of quickening the action of the " water, had constructed it in the form of a breakwater running along " the shore, at a distance of but a few yards, but completely insulated, " and leaving a narrow run of water between it and the old original " bank, could it be doubted that, in such a case, the pursuer, though " losing all the benefit of his open frontage to the river, and cut off from " any useful access to its navigable channel, must yet have been con- " tented with his original boundary, and could have had no pretensions " to the property of the unsightly bulwark by which he was excluded? " But suppose, again, that this insulated breakwater had been faced up " as a quay on the side next to the channel, and levelled on the top " accordingly, and that, in order to make it accessible for the purposes " of trade and navigation, the trustees had connected it with the shore " by two or three bridges across the interposed narrow water-run, would " the property of it have been in this way transferred by what he calls " 'legal accession' to the pursuer? But if open-arched bridges would " not have this effect, would the substitution of a solid mound or two, as " the means of communication, if placed towards its centre, have any " other? It would be strange if they could; and yet, if two such mounds " were placed, one at each of the two extremities of such a breakwater, " they would bring it precisely into the condition of the original front " wall or quay of the trustees, which the pursuer confidently maintains " did convert all the space behind it into his private property. It is " inconceivable, however, that such a trifling change in the plan of the " connecting passages should have so extraordinary an effect; and, if " the trustees could certainly have removed their breakwater, if, after a

of a side, and on the 23d January 1840 pronounced the following interlocutor:—"The Lords, having

"certain trial, it was found not to be serviceable, without raising any "right in the pursuer to compensation in any of the former cases, the "Lord Ordinary cannot understand how he should have such a right in "the last, which, however, is substantially identical with that which has "occurred. It appears to him, in short, that the trustees must always "have a right to remove any embankment they may have erected in the "river, when they find it does not answer their purpose, and that this "right cannot be affected by the mere form or plan of such embankment, "but must be the same whether it is constructed as a detached break-"water or an advanced dyke, touching the shore only at its upper or at "both its extremities, or an open wooden quay resting on a low embank-"ment overflowed at every flood tide.

"The pursuer dwells much on the long possession he has been allowed "to hold of the added ground, and of the plain finality (as he contends) "of the operations by which it was added. But upon both points there "is great and palpable exaggeration. The Lord Ordinary doubts "whether the trustees could, consistently with their duty, have announced "any of their operations as final, while their engineers told them there "was room for improvement; and certainly there never has been any "such announcement. The whole of their operations in fact have been "tentative; and their general character has varied, and even been in "some degree reversed, after years of experience had pointed out the "errors of the first conception. The two first acts, for example, con-"template improvements, chiefly by the construction of artificial chan-"nels, with locks, dams, and sluices, and all the later ones, by scouring "and cleaning the natural bed of the stream; and while the act of "1809 points mostly to gaining additional depth, by narrowing the "water-way, that of 1825 provides most anxiously for bringing up a "larger mass of tide-water, and securing sufficient width for the pur-"poses of navigation. It is not disputed, accordingly, that from the "very first the plan and principles of the operation have undergone "material changes; and that, though the work has been going on ever "since 1758, it was not till 1826 that the experiment of an advanced or "contracting bulwark in front of the pursuer's ground was completed.

"Since that time there cannot well have been any thing like a settled "state of possession; and, considering the nature of the subject, that "possession could scarcely be attended with many indications of owner-"ship. The pursuer accordingly has admitted that the added ground "has been chiefly used for the purposes of navigation, as a towing-path "or landing-place, &c.; and that, except in carrying his drains through "it, and occupying a small part as a tank or basin, he has had no bene-"ficial use of it. But, in truth, he admits enough to show that the "occupancy (or right to occupy) as proprietor has been mostly with the "trustees, or those for whose benefit they were acting. He admits that

Todd
v.
Dunlop
and others.

8th June 1841.

Statement.

" heard the counsel for the parties, and advised the " cause, sustain the defences, assoilzie the defenders,

" they were fully entitled to use it for all purposes connected with the " navigation and trade of the river; and consequently, not only to have " a towing-path and landing-stairs there, but to have occupied it with " cranes and windlasses for unloading vessels, and posts or pauls, and " ground rings for mooring or making them fast, and all the other " apparatus of a landing-place within the city's grant of free harbour; " in short, that they were entitled to take the same use of it as they " might have taken of any other quay or wharf which they had erected " on ground belonging to themselves, or had constructed as a detached " bulwark in the bed of the river, connected with the shore only by " mounds or bridges. The first question to be asked, therefore, is, " whether, if, instead of building this quay in the bed of the river, " beyond the pursuer's original property, they had cut off an equal " breadth—say twenty-five or thirty yards—from what was included " in his measurement, and then in his occupancy, and built up a pier or " quay for such purposes on the space so laid open, the pursuer would " not have been entitled to have been paid for it, as ground actually " taken from him by the trustees for the use of the navigation? But if " his admitted property would have been justly considered as taken from " him, by being appropriated to such uses, it would certainly be rather " extraordinary if a quay, built on what never was his property, should " yet become so by being so appropriated. The present claim of the " pursuer goes down, it will be observed, to the very water edge, and " includes the whole space occupied by the advanced dyke or quay of the " trustees; not, however, to the effect of excluding them from the actual " use of it, which he admits to be preferable to his own, but to the far " more extraordinary effect of preventing them from taking it away when " they find that it does not promote, but obstruct, the uses for which it " was erected.

" He does not (or at least he cannot well) deny, that if, within a " year or two of its erection, they had found it necessary to remove this " their dyke from the bed of the river, they might have done so with- " out making him any compensation. But he seems to think that, " because it was allowed to stand for twelve or fourteen years, they can " now deal with it only as his property. The Lord Ordinary does not " understand this. On the contrary, he is very much inclined to go " along with what is said by the trustees, as to the insufficiency even " of a prescriptive possession, to sanction obstructions in navigable " waters. He is indeed pretty clearly of opinion, that if the opera- " tions had been wholly performed by the pursuer himself, and for the " sole purpose of gaining ground from the river, it would have been " competent for the trustees to have removed them, even after forty " years possession, if it had then been clearly made out that they ope- " rated as such obstructions. That the fact is so, he thinks, is sufficiently

" and decern, but find no expenses due to either " party."

" proved by the reports of their engineers, upon the faith of which they " are now about to remove them, and farther to enlarge the channel, at " very great expense; and he does not see that it should make any " difference, in the pursuer's favour at least, that they were originally " made, not at his expense but theirs; and not with the most remote " view to his benefit, but under an erroneous expectation of improving " the navigation.

" The Lord Ordinary will not go into the authorities referred to on " either side, no one of which he thinks bears materially on the hinging " points of the present case, which are in the peculiar powers and " privileges of the defenders, as parliamentary trustees. But even upon " the more general questions involved in former cases, it appears to him " that the pursuer has little to found on beyond certain obiter dicta " reported (more or less correctly) as having fallen from judges, no " doubt of great authority, when deciding cases which did not call for " the announcement of any such large principles; and he must add, " that the account given (at page 28. of the defenders case) of the pro- " ceedings in the House of Lords, as to the most recent of these cases, " goes very far to shake the authority, not only of its decision in this " Court, but of the previous decision in that of Campbell and Brown. " But the true ground of the Lord Ordinary's opinion here was not, as " he conceives, involved in any of those cases.

" Before concluding, however, he thinks it right to say, that the only " thing that has occasioned any hesitation in his mind is that express " provision in the act of 1825, by which, while giving ample powers to " widen the channel, if necessary, there is 'reserved to the proprietors " 'of adjacent lands all rights to soil acquired from the said river, or " 'other rights competent to them at common law.' There is some- " thing perplexing, no doubt, in this distinct reservation; and it is not " easy to adopt the trustees explanation, that it was a mere redundancy, " and gave no benefit or security that would not have been enjoyed " without it. The Lord Ordinary holds, that it gave something more " than this, but thinks that what it gave was security rather than any " new right; and while he cannot construe it, therefore, as excluding " any right which would otherwise have been clearly in the trustees, he " conceives that its insertion will be sufficiently explained and its object " satisfied, by holding that it was meant only to secure to the adjacent " proprietors such acquisitions of soil as might have come to them by " natural imperceptible accession, and to exclude what might have been " a plausible claim on the part of the trustees to interfere, without pay- " ment, with such acquisitions.

" He has reported the case to save a little time and expense to the " parties, and not, as will be seen, on account of any difficulty he should " have felt in deciding it."

Todd v. Dunlop and others.

The pursuer appealed.[1]

8th June 1841.

Statement.

In the course of the Lord Advocate's address, in opening the case of the appellant, the attention of the House and of the bar was directed by Lord Brougham to the case of Smart v. Magistrates of Dundee.[2]

Ld. Brougham's Speech.

Lord Brougham.—I find that the case of Smart is not in the Faculty Collection, but there is a full report of it, taken from the appeal cases, in 8 Brown's Cases in Parliament. I have looked into that case, and it appears to me to bear closely on the present, in so far as the general question of law raised in both cases is the same, and the pleas maintained for the parties respectively exactly similar. There Lord Monboddo, as Ordinary, decided in favour of the pursuer, and found, "that as the pursuer's property is bounded on the south "by the sea-flood, he has a right to whatsoever land "the sea leaves adjoining to his property, or that he "shall acquire by any opus manufactum, not prejudicial "to the navigation of the river;" but the Court altered, and sustained the defences; the defence in substance being, that the ground in question was not in the pursuer, but in the town of Dundee; which last judgment was affirmed.

Ld. Chancellor's Speech.

Lord Chancellor.—That case shows that the ground so acquired was in the grantor, and not in the grantee. How then can the grantee here claim ground, acquired by the operations of the trustees, upon the

[1] The appellant having died before the hearing, the appeal was revived in the names of his executors.

[2] Affirmed, 22d Nov. 1797; 8 Brown's Cases in Parliament, 119.

solum which belonged to the grantors? The case of Smart rules the present, and it also appears to be consistent with the doctrine in Erskine, as quoted in the papers.

Lord Advocate. — If your Lordships be of opinion that the two cases are not distinguishable in their circumstances, I shall not press the argument on the general point. But the terms of the statutes, particularly the reservation in the act of 1825, deserve consideration.

Mr. Attorney General.—That merely reserves to proprietors what was in them; it does not confer any new right. The respondents case below was, in truth, overloaded with matter from these statutes.

LORD CHANCELLOR.—The clause referred to leaves the law as it stood before. I propose, that your Lordships do affirm the judgment of the Court below, with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, therein complained of, be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

TODD
v.
DUNLOP
and others.

8th June 1841.

Appellant's Authorities. — Marquess of Tweeddale v. Kerr, 14th May 1822; Campbell v. Brown, 18th Nov. 1813; Boucher v. Crawford, 30th Nov. 1814; Ersk. 2. 1. *5*; Fisher v. Duke of Atholl's Trustees, 3d June 1836; Ersk. 2. 1. *6*; Ibid. 2. *6*. 17; Innes v. Downie, 27th May 1807, Baron Hume's Dec. p. *552*; Magistrates of Culross v. Geddes, 24th Nov. 1809, Ibid. *554*; Leven v. Magistrates of Burntisland, 27th May 1812, Ibid. *557*.

Respondents Authorities. — Duke of Atholl v. Maule, 7th March 1812, affirmed, *5* Dow, 282; Ersk. 2. 1. *5*; Craig, 1. 16. *5*; Stair, 2. 1. *5*; see Smart, 22d Nov. 1796, affirmed 22d Nov. 1797, 8 Brown's Parl. Cases, 119; Duke of Atholl v. Maule, 4th Feb. 1817; 2 Bell's Illust. 2; Ersk. 2. 6. 3; Dig. b. 43. tit. 12 & 13; Colquhoun, 21st Dec. 1793, Mor. 12,827; Grant, 9th March 1781, Mor. 12,820; Forbes, 19th Feb. 1824, affirmed, 1 W. & S. 583; Menzies, 4th July 1826, reversed, 3 W. & S. 235; see Attorney General v. Richards, Trin. Term, 1794, 2 Anst. 603; Rex v. Smith, Trin. Term, 1780, 2 Doug. 441; Rex v. Lord Grosvenor and others, Trin. Term, 1819, 2 Stark. 511; and Vought v. Winch, Trin. Term, 1819, 2 B. & A. 662, 663; Melville, 29th May 1830; Campbell, 19th May 1836.

ARCHIBALD GRAHAME — RICHARDSON and CONNELL, Solicitors.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1841.

[Heard, *July* 29, 1840 — Judgment, *June* 22, 1841.]

WILLIAM DIXON of Govan Colliery, Appellant. (No. 14.)

[*Lord Advocate* (*Rutherfurd*) — *Sir W. Follett.*]

MRS MARGARET FISHER and Husband, Respondents.

[*Attorney General* (*Sir J. Campbell*).]

Husband and Wife — Jus Relictæ — Dealings by a widow, in regard to the estate of her husband, held to amount to acceptance by her of provisions made to her by the husband, and to bar her from claiming jus relictæ.

Jus relictæ — Legitim — A widow having, by dealings with her husband's executor, renounced her claim to jus relictæ, cannot, as against one of his children, recall the renunciation, so as to affect the child's legitim.

2d DIVISION.

Lord Ordinary Moncreiff.

Statement.

ON the 14th December, 1809, William Dixon, and his wife Janet Smith, executed a mutual deed, whereby, on the narrative that they had been married many years, and that no marriage-contract had been executed between them, nor any provision made by him in her

DIXON v. FISHER. 22d June, 1841. Statement.

favour, in the event of her surviving him, Dixon bound his heirs and successors to make payment to her, during her lifetime, of a free liferent annuity of L.150 sterling; beginning the first term's payment at the first term of Whitsunday or Martinmas after his decease; and for security of payment of the annuity, he bound himself to infeft her in a liferent annuity of L.150 sterling, to be uplifted and taken, free of all burdens, furth of lands specially mentioned.

By the same deed he also bound himself to infeft her, during her lifetime, in the event of her surviving him, "in the liferent of the mansion-house, garden, and "offices of Neuck Palace Craig, with the park of ground "in which the same are situate, consisting of twenty-"two acres, or thereby."

He also assigned and conveyed to her, in absolute property, in the event of her surviving him, "the whole "household furniture, and plenishing, bed and table "linen, and plate, that shall be pertaining and belong-"ing to me at the time of my death, likewise three of "the best milch cows, which shall belong to me."

These provisions Mrs Dixon accepted in the following terms:—"I, the said Janet Smith, do hereby accept "of the provisions before mentioned, in the full of all "I could ask or claim, by or through the decease of the "said William Dixon, hereby renouncing the legal "provisions I might be entitled to in the event of my "surviving him."

This deed contained all the usual and necessary clauses for making effectual the obligations upon Mr Dixon, by infeftment or otherwise.

What was the situation of Mr and Mrs Dixon at the time of their marriage, in regard to pecuniary matters, does not appear; nor is it ascertained what was the

exact state of the husband's pecuniary means at the date at which this deed was executed. But it seemed to be admitted, that his fortune and situation in life were both considerably improved at the latter period, from what they had been at the date of his marriage.

On the 11th April, 1817, Dixon executed a disposition and deed of settlement, whereby, on the narrative that he was resolved to make a settlement of his affairs, to take place in the event of his death, in order that all disputes and differences with regard to his property might be avoided; and, considering that he had already in part provided for his wife by a separate liferent-deed, executed by him in her favour, "which provision, "so made, is hereby ratified and approved of, and "which, with the additional provision after mentioned, "is hereby declared to be in full to her of all that she can "ask or claim in and through my decease," and that it was now necessary he should provide for his children, therefore he conveyed to John Dixon and William Dixon, his two sons, and the survivor of them, his whole heritable and moveable estate whatsoever, under burden of payment, in the first place, of all his debts; second, of L.2000 to each of his daughters; "and in the third "place, for payment of the sum of one thousand pounds "sterling to my wife, (in case she survive me,) six "months after my death, over and above the other "provisions conceived by me in her favour by separate "deed, as before mentioned, the said sum to bear inte-"rest from the foresaid term of payment, until actually "paid."

By this deed he appointed his two sons, John and William, and the survivor of them, his executors, universal legators, and intromittors with his whole estate, and reserved to himself the full power and enjoyment of

DIXON v. FISHER. 22d June, 1841. Statement.

his said whole means and effects, with power to revoke the deed in whole or in part; declaring, that in so far as the same should not be revoked, in so far the same should remain effectual, although found lying by him, or in the custody of any other person, undelivered, at the time of his death.

On the 15th March, 1820, Dixon executed a codicil to his settlement, which stated, that his worldly affairs had continued to prosper, and gave his children additional provisions, without making any change in those of his wife.

On the 23d November, 1821, he executed a disposition and assignation, whereby, for love, favour, and affection to his wife, and other considerations, he assigned and conveyed to her, in case she should survive him, "all and whole the two front northmost shops and "back shops, situated on the west side of that street " called Great Glassford Street," in the city of Glasgow, the deed containing the usual and necessary clauses for infeftment; and "all and whole these my forty shares of " the undertaking of the Monkland Canal navigation, " as the said shares stand divided by an Act of Parlia- " ment of the fifty-third year of his late majesty, " together with the dividends that may become due on " the said forty shares, from and after my decease, and " in all time coming."

On 16th October, 1822, Dixon, the testator, died. He was survived by his wife, his two sons, John and William, and four daughters, Mrs Mann, Mrs Fisher, Mrs Whitehead, and Lilias Dixon.

Mrs Fisher was not satisfied with the provision made for her by the deeds which have been enumerated, and with the view of determining whether it would be most for her advantage to betake herself to her legitim, she

brought an action of multiplepoinding against the widow, and the other daughters, and their husbands, in the name of the two sons, as their father's executors, setting forth, that "in order to ascertain the nature and "extent of the property left by the said deceased Wil- "liam Dixon, and the proportion which, by law or "otherwise, the pursuers, and their said mother and "sisters, or the husbands of such of their said sisters as "are married, are entitled to, either in virtue of special "deeds, or as jus relictæ, legitim, bairns' part of gear, "or otherwise, the pursuers, as having intromitted with "and taken possession of the said means and estate," were willing to exhibit and give access to the whole writs, &c.; and subsuming, that the said writs, &c. being so exhibited, "the respective rights and interests "of the pursuers and the said several defenders, in the "means and estate of the said deceased William Dixon, "ought and should be fixed and ascertained; and for "this purpose, the pursuers are willing, conjunctly and "severally, to hold just count and reckoning with the "said several defenders for their respective shares and "interests in the said means and estate, so far as intro- "mitted with by them, and to give up, relinquish, and "make cession or delivery and payment to them, and "each of them, of whatever shall be found to be the "just and legal share and interest of the said several "defenders respectively, in the means and estate of "the pursuers' said deceased father," &c.

The widow was very much displeased with Mrs Fisher because of this proceeding to disturb the will of her husband, and the consequence was a breach between her, and this daughter, and the rest of the family. The process of multiplepoinding was nevertheless proceeded in.

DIXON v. FISHER. 23d June, 1841.

Statement.

On 28th February, 1826, the widow and the two sons executed a deed, which contained the following expressions: — "In the first place, and on the one part, the "said John Dixon and William Dixon bind and oblige "themselves, jointly and severally, and their heirs, "executors, and successors, to make payment to the "said Janet Smith or Dixon, their mother, her heirs, "executors, or assignees, of the sum of L.5400 ster-"ling, and that at and upon the term of Whitsunday, "1836, with the interest thereof, from the day of "October, 1822, the period of the death of the said "William Dixon, until paid, and, when required, to "grant bond with heritable security for the payment of "the said sum and interest: Farther, to pay to the "said Janet Smith or Dixon, her heirs or assignees, "during her life, a free yearly annuity of L.200 ster-"ling, payable half-yearly, at Whitsunday and Mar-"tinmas in each year, and to grant bond with heritable "security for the regular payment of the said annuity, "when required: To assign and make over to the said "Janet Smith or Dixon, the liferent of the house and "garden at Govan-hill, as now occupied by her, during "all the days and years of her life, and to allow and "provide, graze, and feed three cows in the park "adjoining the said house and byre at Govan Col-"liery, all free of rent; and also at their own ex-"penses to furnish, keep, and maintain for her, in "good order and condition, a four-wheeled chaise "and pair of horses during her life: Farther, to "deliver over to her the whole household furniture, "plate, and bed and table linen, which belonged to her "said deceased husband at the time of his death, to be "used and disposed of as her own property at pleasure: "Farther, the said John Dixon and William Dixon

" hereby consent and agree that the said Janet Smith " or Dixon shall have right to the two shops in Glass- " ford Street, as presently possessed by the said John " and William Dixon and John Walker. In the " second place, and on the other part, the said Janet " Smith or Dixon hereby not only declares herself " satisfied with the provisions before mentioned, in lieu " of, and in full of all claims of whatever nature, whe- " ther legal or conventional, she is entitled to from the " estate of the said deceased William Dixon, her hus- " band; but she hereby gives up, dispones, conveys, " and renounces, to and in favour of the said John " Dixon and William Dixon, and their heirs and suc- " cessors, all such claims and rights, in whatever way " conceived, and whether legal or conventional, and " hereby binds and obliges herself, her heirs, executors, " and successors, to execute all revocations, conveyances, " or other deeds that may be necessary for investing them " and their foresaids in the full right thereof, with full " power to them and their foresaids to follow furth and " make the same effectual, by all competent and legal ways " and means: Farther, the said Janet Smith or Dixon " hereby acknowledges that she has, since the death of " her said husband, received from the said John Dixon " and William Dixon the sum of L.1569, 16s. sterling, " to account of the sums provided to her, as aforesaid: " And lastly, each of the parties bind and oblige them- " selves, and their heirs, executors, and successors, to " execute in favour of each other, and their foresaids, " all deeds that may be required, the one from the " other, for carrying this agreement into full effect."

At the same time that this agreement was executed, the widow executed a transfer of the forty shares of the Monkland Company's stock, " which belonged to the

DIXON v. FISHER. 22d June, 1841.

Statement.

" said deceased William Dixon, and were conveyed by " him in my favour, conform to disposition and assig- " nation, bearing date the 23d day of November, 1821, " with the dividends due on the said forty shares, at and " prior to the date hereof, and in all time coming, de- " claring always, that these presents shall be without " hurt or prejudice, in any manner of way, to my legal " rights and claims against the property, real and per- " sonal, of my said late husband, and full power to " vindicate the same.

On the 8th September, 1826, the two sons, John and William executed a deed, which recited their father's disposition and settlement of April, 1817, and continued thus: — " And being desirous to liquidate and pay off " our debts, as well as the provisions left by our said " father, and to arrange the affairs of the different con- " cerns belonging to us, and to make a division of the " different properties and subjects left us by our said " father, after all claims against them and us shall have " been first paid, or otherways arranged, to the mutual " satisfaction of ourselves and the creditors, we have " determined, for attaining these objects, to grant the " trust-deed underwritten."

On this recital, they conveyed to Cuthbertson and others, as trustees, " all and sundry lands, heritages, " leases, minerals, adjudications, teinds, and heritages of " every description or denomination, pertaining or be- " longing to us in partnership, or individually, and all " debts and sums of money, whether heritable or move- " able, and all claims whatsoever, due or competent to " us, or either of us, with every other species of pro- " perty, real or personal, connected with any farms or " undertaking with which we, or either of us, are con- " nected or concerned."

On the 29th May, 1827, a deed of agreement was entered into between the sons, John and William, which recited, that their father, by his general disposition and settlement, dated the 11th day of April, 1817, conveyed to them all his property of every description, subject to the legacies and provisions left by him to his widow, and other children, as specified therein, and in other relative deeds: That they had entered on the possession of the property, real and personal, conveyed to them by the said disposition and settlement, and proceeded to make up titles to parts thereof: That since their father's death, they had carried on the business of coal and iron masters, under the firm of "John and William Dixon," whereby considerable debts had been contracted, and were still resting: That in order to secure their creditors, and facilitate a division between themselves of the residue of their joint property, they had executed the trust-disposition of 8th September, 1826, whereby they conveyed their whole property to Donald Cuthbertson and others, as trustees for purposes therein mentioned: That in order to accelerate the winding up of the affairs, they agreed, "Primo, That the said William Dixon, "from and after the 15th day of May current, is, sub-"ject to the conditions after mentioned, to have right "to the whole joint property, real and personal, which "belonged to the saids John and William Dixon jointly, "or as a company, whether derived from their said "father, acquired subsequently for their behoof, or "otherwise connected with or belonging to the said "joint concern. Secundo, That the said William "Dixon and his foresaids shall be liable for, and relieve "his said brother and his successors, of the payment of "the whole joint debts and obligations of the said John "and William Dixon, and of the legacies and annui-

Dixon v. Fisher. 22d June, 1841.

Statement.

"ties left and bequeathed by their said father yet "remaining unpaid, interest that may be due thereon, "and also all debts and engagements of their said "deceased father remaining unsettled, and all claims "and lawsuits connected therewith, or in any way "relating thereto, and lawsuits instituted by the said "company;" and, in general, for every obligation, of whatever kind, incumbent on the said John Dixon, relative to their joint concern, or due by them jointly, as representing their deceased father. The consideration given to John for this agreement was L.35,000.

William did not settle with his mother and sisters in terms of this agreement, and in consequence, John raised two actions against him to enforce the agreement.

In September, 1830, the widow addressed a letter to John, in the following terms: — "I hereby agree "to relieve you of all liability whatever, either as an "executor of the deceased William Dixon, Esq., or "as a partner of the late firm of John and William "Dixon, and oblige myself to grant an ample dis- "charge thereof upon demand. In your stead I have "taken Mr William Dixon alone for implement of "all the provisions in the deceased's settlement, and "of every obligation of the late firm, so far as I am "interested in any manner of way." The sisters, Mrs Mann, Miss Dixon, and Mrs Whitehead, also signed letters agreeing to take William as their sole debtor, — the wording of which was the same, as that of the letter signed by the widow.

In December, 1830, the widow, Mrs Whitehead, her husband, and Miss Dixon, executed a discharge in favour of William, which narrated, that by the bond of annuity of 14th December, 1809, the deceased Mr Dixon bound himself "to make payment to me, the

" said Janet Smith or Dixon, during all the days and " years of my lifetime, in the event of my surviving " him, of a free liferent annuity of L.150 sterling, " payable at two terms in the year, all as particularly " set forth in the said heritable bond of annuity: That " by disposition and settlement, dated 11th April, " 1817, made and granted by the said deceased William " Dixon, he, upon the narrative, inter alia, that he had " already in part provided for his wife by a separate " liferent-deed executed by him in her favour, gave, " granted, &c., under the burden of payment of the " sum of L.1000 sterling to me, the said Mrs Janet Smith " or Dixon, his wife, in case I survive him, six months " after his death, over and above the other provisions " conceived by him in my favour by a separate deed:" That "we, the said Mrs Isabella Dixon or Mann, and " Miss Lilias Dixon, ratified the said settlement, con- " taining the provisions above mentioned, made by him " in our favour, of which provisions we accordingly " accepted, and declared ourselves satisfied therewith:" And that the agreement of February, 1826, and the trust-disposition of that year, described as being, " inter " alia, for the purpose of liquidating, paying, and " securing, the provisions left by the deceased William " Dixon," and the contract of agreement between John and William Dixon, had all been executed. On this narrative the deed proceeded thus: — " And now, " seeing that we, the said parties hereto subscribing, " are satisfied with the individual responsibility of the " said William Dixon, (the son of the said deceased " William Dixon,) and with the security created by " the said trust-disposition for implement and pay- " ment of the provisions due to us under the settle- " ments executed by the said deceased William Dixon

Dixon v. Fisher. 22d June, 1841. Statement.

"or otherwise, and have, at the request of the said "William Dixon, agreed to discharge his brother, "the said John Dixon, of all liability whatever "therefor, as after mentioned: Therefore we, the said "Mrs Janet Smith or Dixon, Mrs Janet Dixon or "Whitehead, Joseph Whitehead, Mrs Isabella Dixon "or Mann, and Miss Lilias Dixon, with joint consent "and assent, and for our several rights and interests "in the premises, have released and discharged, &c. "reserving to us, and every one of us, our claims "against the said William Dixon, (the son,) and our "rights under the foresaid trust-disposition executed "by the said John Dixon and William Dixon, and our "claims against all other persons for the said provisions "in our favour, which shall in no way be hurt or "impaired by the granting of these presents, or by any "thing herein contained."

This deed was subscribed by William, and also by John.

On 14th December, 1831, an action of reduction was brought in the name of the widow and of the son, William, the latter being described as "the assignee of "his said mother, under and in virtue of the writs after "specified." This action was directed against all the other members of the family, and was brought for the purpose of reducing the bond of annuity, which Mr Dixon had granted on 14th December, 1809, and "any writ or writs which are alleged by the defenders "to be, or to import, an acceptance by the pursuer, "Mrs Janet Smith or Dixon, of the said provisions, in "satisfaction of the legal provisions arising to her, as "widow of the said deceased William Dixon, in so far "as the said bond of annuity or other writs bear, or "may be held to import that the said Janet Smith

" either accepted of the said provisions granted in her " favour by the said bond, or otherwise in satisfaction " of what she could ask or claim by or through the " said William Dixon's decease, or renounced her legal " provisions in the event of her surviving him, and in " so far as the same do in any other respect affect or " impinge upon the legal rights and interests of the " pursuer, the said Janet Smith, as wife and relict of " the said deceased William Dixon." The reasons of reduction were, that when the marriage between Mr and Mrs Dixon was dissolved by his predecease, his estate consisted not only of extensive heritable properties, but likewise of personal funds of great amount, out of which Mrs Dixon was entitled to claim her terce and jus relictæ, and of which provisions he had no power to deprive her: That Mrs Dixon never accepted of the provisions made to her in lieu of her legal provisions, and, consequently, any conditions annexed to the provisions granted in her favour were void: That even if she had accepted the provisions granted in her favour, in satisfaction of her legal provisions, a power of revocation was implied in such acceptance, as being a donatio inter virum et uxorem, inasmuch as the provisions settled upon her were very much inferior to the value of her legal provisions, as at the time of her husband's death, and also, inasmuch as the conventional provisions were greatly diminished in value, by being made to depend entirely upon the uncertain event of her surviving her husband, and were rendered uncertain, by the bond of annuity having remained in the hands of her husband, or within his power, until his death, and never having been followed by infeftment. The summons then proceeded: — " And the said alleged renunciation or dis- " charge of the pursuer's claims of terce and jus relictæ,

Dixon v. Fisher. 22d June, 1841. Statement.

"said to be granted by the foresaid bond of annuity "or otherwise, being revocable at the pleasure of the "said pursuer, and she, by this action, exercising that "power accordingly, the said alleged acceptance and "renunciation are null and void." The conclusions were, that the bond and other writings should be reduced. "And whereas, in virtue, first, of an assig- "nation imbodied in an agreement between the said "Janet Smith or Dixon and John Dixon and William "Dixon, dated the 28th day of February, 1826; and, "secondly, of a deed of agreement between the said "John Dixon and William Dixon pursuer, transferring "all interest in the premises from the former to the "latter, dated the 29th day of May, 1827, the said "William Dixon, pursuer, has now right, inter alia, "to the funds belonging to the pursuer jure relictæ as "aforesaid: And it ought and should be found and "declared, by decree foresaid, that the value of the "goods in communion remaining free and divisible at "the dissolution of the marriage, amounted to the sum "of L.30,000 sterling, more or less, as shall be ascer- "tained by our said Lords; and that the share thereof "falling to the pursuers, the said Janet Smith or "Dixon, or to the said William Dixon, as her assignee, "amounts to the sum of L.10,000 sterling, or such "other sum, more or less, as shall be found to be her "just and legal proportion thereof; with the lawful "interest or other produce of the same, which may "have accrued since the death of the said William "Dixon: And farther, it ought and should be found "and declared, by decree foresaid, that the pursuers "have right to, and are entitled to claim, the whole "provisions and bequests made to the said Janet Smith "or Dixon, without any qualification or condition as to

" her acceptance thereof, (other than and excepting " what are contained in the said bond of annuity,) " notwithstanding her claiming her said legal provi- " sions, and not renouncing the same, or revoking the " said renunciation or acceptance: Reserving fully and " expressly to the pursuers, their right to the foresaid " conventional provisions secured by the said bond of " annuity, and all other provisions in favour of the said " Janet Smith or Dixon, in case it shall be found, in " the course of the process to follow hereon, that she " has irrevocably renounced or discharged, or is other- " wise not entitled to, the said legal provisions."

Statement.

Preliminary defences were put in by Mr and Mrs Fisher to this action, and here it was allowed, by the appellant, to remain for some years.

On 20th December, 1834, Mrs Dixon, the widow of the testator, died, leaving a testamentary deed, whereby she appointed her daughter, Lilias, to be her sole executrix and universal legatee.

Some time after this, the Fishers wakened the process of reduction, which had been allowed to fall asleep. John Dixon now put in defences, in which he denied the statement in the summons, that the deed of 28th February, 1826, was intended to operate as an assignation to himself and the pursuer, William Dixon, of the widow's legal claims on her husband's estate, and explained that it was a deed entered into by the widow purely for relieving the difficulties of himself and William at that time, by enabling them to get possession of, and sell the Monkland Canal stock, which they accordingly did very soon afterwards.

On 27th February, 1836, the Lord Ordinary reserved consideration of the preliminary defences put in by the Fishers, and granted diligence at their instance for

Dixon v. Fisher. 22d June, 1841. Statement.

recovery of writings specified by them. This specification included all documents tending to shew that Mrs Dixon had discharged her legal or conventional provisions, or accepted the conventional provisions, and a similar diligence was granted in the multiplepoinding. Under these diligences, Mr Romanes, W.S. who had been the law agent both of Mrs Dixon and of William Dixon, was examined, and required to produce any deed or deeds of revocation "executed by the deceased "Mrs Dixon, of the renunciation contained in the "heritable bond of annuity mentioned in the summons: "Depones, that he has not, and never had, any such "deed or deeds, and never saw any such to his know- "ledge, and does not know or suspect where any such "may be."

After these commissions and diligences had been reported, there was lodged in the process of multiplepoinding two documents, viz. 1st, A mandate to Messrs Tod and Romanes, W.S. in these terms:— "Glasgow, 3d June, 1823.—Gentlemen,—We hereby "authorize you to appear for us in the process of mul- "tiplepoinding raised by Mr Fisher, in regard to the "succession of the late Mr Dixon, against us and "others, and to claim our legal shares of said succes- "sion.—We are, &c. (Signed) Janet Dixon, Janet "Whitehead, Joseph Whitehead, Lilias Dixon, Isa- "bella Mann, William Dixon. To Messrs Tod and "Romanes, W.S. Edinburgh." 2d, A deed, dated 12th March, 1824, in these terms:—"I, Mrs Janet "Smith or Dixon, widow of the deceased William "Dixon of the Calder Coal and Iron Works, con- "sidering that my said late husband, by heritable "bond of annuity, dated the 14th day of December, "1809, and recorded in the Sheriff-court books of

" Lanarkshire the 23d day of October, 1822, upon " the narrative that no antenuptial marriage-contract " had been executed between us, nor any provisions " made by him in my favour in the event of my " surviving him, did, therefore, in the event foresaid, " make certain provisions in my favour, as the same " are more particularly specified and contained in said " heritable bond of annuity, which is said to be sub- " scribed by me, and to bear that I, the said Janet " Smith or Dixon, did thereby accept of the provisions " therein contained, in full of all I could ask or claim " by or through the decease of the said William Dixon, " thereby renouncing the legal provisions I might be " entitled to in the event of my surviving him; and " that, thereafter, by disposition and settlement, exe- " cuted by the said William Dixon upon the 17th day " of April, 1817, and codicil thereto, dated the 15th " day of March, 1820; and by disposition and assigna- " tion, bearing date the 23d day of November, 1821, " all recorded in the Sheriff-court books of Renfrew- " shire the 23d day of October, 1822, he made certain " other provisions in my favour, as the said deeds more " fully bear. And farther, considering that the provi- " sions, so conceived in my favour, are not in any " degree or proportion commensurate to my legal pro- " visions, and, therefore, my alleged acceptance of the " former, and renunciation of the latter, for such inade- " quate cause, is extremely prejudicial to me, and I am " resolved to revoke the same, under the sanction of " the law, which permits married persons to revoke all " donations they may have been induced to make " during the subsistence of their marriage: Therefore, " that I may be restored against the said alleged accep- " tance of the foresaid provisions and renunciation of

DIXON v. FISHER. 22d June, 1841. Statement.

" my legal provisions granted by me in manner fore-
" said, I hereby revoke and recall the same, to the end
" that I may be reponed ad integrum against the same,
" and restored to my whole legal rights, as if the said
" pretended acceptance and renunciation had never
" been granted: And I hereby declare, that the same
" was granted by me without good and sufficient
" onerous cause, and at the instance of my said hus-
" band; and I consent, &c. In witness whereof, I have
" subscribed these presents, (written upon stamped
" paper by Adam Paterson, clerk to John Tod, writer
" to the Signet,) at Edinburgh, the 12th day of March,
" 1824 years, before these witnesses, John Romanes,
" writer in Edinburgh, and Adam Anderson, shoe-
" maker in Edinburgh.

" (Signed) JANET DIXON.

" John Romanes, *witness.*

" Ad. Anderson, *witness.*"

There was also produced at the same time in the action of reduction a mandate by Mrs Dixon to Messrs Tod and Romanes, in these terms: — " Govan-hill, " March 11, 1830. — Gentlemen, — I hereby authorize " you, as my agents, to institute an action of reduction, " or such other measure as may be deemed necessary " for setting aside the settlements of my deceased hus-
" band, to the special effect of enabling me or my " assignees to make effectual the legal claims competent " to me jure relictæ or otherwise. — I am, &c."

The Fishers now put in defences on the merits of the action of reduction; and on seeing these, William Dixon, the appellant, asked leave to amend the summons. The Lord Ordinary refused to allow this, but gave him leave to repeat a supplementary summons. The appellant availed himself of this leave, and on

20th April, 1837, he raised a new action of reduction.

The summons in this new action was by the appellant, as assignee, as after mentioned, of the now deceased Mrs Janet Smith or Dixon, relict of the said deceased William Dixon, and also as a general disponee and assignee of the said William Dixon, of all his estate and effects belonging to him at the time of his death, in virtue of a general disposition and settlement, dated the 11th day of April, 1817, and assignee also of the said John Dixon, as after mentioned, and was directed against his brother and sisters, and their husbands. It recited the summons in the original actions, and the leave given to repeat a supplementary summons, and then proceeded: — "And, accordingly, the pursuer now "institutes this supplementary action, but without pre- "judice in any respect to the foresaid original action of "reduction, declarator, count, reckoning, and payment, "or any of the reasons or conclusions thereof: That is "to say, the said defenders to bring with them, exhibit, "and produce, before our said Lords, the foresaid bond "of annuity and other writs which are particularly and "generally mentioned and called for, as above set forth "in the said original summons of reduction, declarator, "count, reckoning and payment, and which are here "held as repeated brevitatis causa, — all to be seen and "considered by our said Lords, and to hear and see "the same, with all that has followed or may follow "thereon, in so far as the said bond of annuity or other "writs bear, or may be held to import, that the said "Janet Smith either accepted of the said provisions "granted in her favour by the said bond or otherwise, "in satisfaction of what she could ask or claim by or "through the said William Dixon's decease, or re-

DIXON v. FISHER. 22d June, 1841. Statement.

" nounced her legal provisions in the event of her sur-
" viving him, and in so far as the same did in any other
" respect affect or impinge upon the legal rights or
" interests of the said Janet Smith, as wife and relict of
" the said deceased William Dixon, reduced," &c.

The four first reasons of reduction were the same as those assigned in the original summons; and after stating them, the summons continued,—" And the said alleged " renunciation or discharge by the said Janet Smith or " Dixon, of her claims of terce and jus relictæ, said to " have been granted by the foresaid bond of annuity or " otherwise, and her alleged acceptance of the foresaid " conventional provisions proposed to be given to her " in lieu and satisfaction thereof, being revocable at " her pleasure, she exercised her power of revoking the " same accordingly, by a variety of acts and deeds, and " particularly by the following:" —

The acts here founded on were the mandate in 1833, to appear in the action of multiplepoinding — the deed of revocation of 12th March, 1824 — the deed of 28th February, 1826 — the transfer of the Monkland Canal shares — the mandate to raise the original action of reduction — and, finally, that action itself. And the conclusions of the summons were precisely the same as those of the original summons.

The Fishers pleaded in defence to those two actions, — 1st, That the bond of 1809 was reasonable at its date, and irrevocable. 2d, That the widow had not only accepted the provisions contained in that deed during her husband's life; but after his death, had assumed possession of them, and of the additional provisions in the other deeds by her husband, and had thereby barred herself from claiming her legal provisions. 3d, That the deeds of agreement of 28th Feb-

ruary, 1826, and 29th May, 1827, did not afford any legal foundation for the action. 4th, That there was no evidence of the deed of revocation of 12th March, 1824, having ever been delivered, without which it was ineffectual, and that documents, not testamentary, kept latent till after the death of the granter, could not be founded upon against third parties, in derogation of the subsequent public and open acts of the granter.

The facts of the case tending to shew how far Mrs Dixon had accepted or dealt with the conventional provisions given her by her husband, so far as admitted between the parties, or proved in evidence, in addition to what is contained in the deeds already detailed, were these: —

I. Prior to February, 1826. — 1st, The testator died in a house at Govanhill, which had not any ground surrounding it. Mrs Dixon remained in this house, and did not in any way exercise the right of liferent over the house of Palace Craig, and the twenty-two acres of ground, given her by her husband's deed of 1809. 2d, Mrs Dixon received various payments of money, amounting, as stated in the deed of February, 1826, to L.1569, 16s. The appellant did not produce receipts for these payments, and the respondents did not succeed under the commission and diligence in recovering any. On what account these payments were made, did not appear, except that in the books of the sons, the payments were entered in general and indefinite terms. 3d, The rents of the Glassford Street houses appeared, by the books of the sons, to have been received by them, and to have been entered to the credit of an account for that property, — repairs and insurance being placed to its debit. The balances upon this account from time to time did not

DIXON v. FISHER. 22d June, 1841.

Statement.

appear to have been transferred to any other account. 4th, There was no evidence to shew by whom the dividends on the Monkland Canal shares had been received, with the exception of a sum of L.110, entered in the books of the sons, as having been received in February, 1823; and there were produced drafts and copies of letters in 1825, between the sons and the Canal Company, shewing that the sons wished to have the shares transferred to them, under the conveyance in their father's deed of April, 1817; but that the company declined doing so, until confirmation of the father's will should be expede. Lastly, Mrs Dixon never appeared in the multiplepoinding to claim her provisions, legal or conventional; but it was said, that the term for doing so had not arrived in her lifetime, as the pleadings in that case during her life had related solely to the amount of the fund in medio.

II. After February, 1826. — 1st, Mrs Dixon continued to reside at Govanhill as formerly. 2d, L.5400 and also L.4000, as the capital of the annuity of L.200, were placed to the credit of Mrs Dixon's account in the books of her sons; and from these books it appeared, that she, from time to time, received payment of the interest of these sums. 3d, The rents of the Glassford Street houses appeared, from the books of the sons, to have been received by them, and carried to Mrs Dixon's credit in account. 4th, In the books of the sons there were journal entries in each year of a sum of L.2400, as the value of the Monkland Canal shares; and in September, 1826, there were journal and ledger entries, shewing that the shares had been sold for L.3100.

After a record had been made up on the original and supplementary summons, and defences, and condescendence, and answers, parties were heard by their counsel.

The Lord Ordinary then pronounced an interlocutor, expressing, that his opinion was made up; but giving the parties the option of going into the question of fact as to the adequacy of the conventional provisions, before receiving his judgment. The appellant wished to go into this inquiry; but the respondents preferred, that the adequacy of the provisions should be assumed in the meanwhile.

The Lord Ordinary, on 22d June, 1838, pronounced this interlocutor, accompanied by the note which follows[1]: —

" The Lord Ordinary having considered the closed " record in this process of reduction, and having heard

---

[1] " *Note.* — It would require a much longer statement than it would be " proper for the Lord Ordinary to annex to the above interlocutor, to explain " in detail the grounds on which he has come to the conclusion expressed in " it. He will endeavour to state the leading points as shortly as he can.

" But it may first be proper to explain, that before giving out this judg- " ment he put it in the view of the parties, that as it would necessarily " supersede the other question involved in the reduction, viz. Whether, if " Mrs Dixon had in any competent form repudiated her husband's settle- " ments, and brought a reduction of the discharge of the marriage-contract, " she had sufficient ground in law for doing so, — it was for the consideration " of the defenders, whether the matter of fact necessarily requiring to be " ascertained for solving that question should or should not be first inquired " into. That question comprehends two points — 1st, Whether the provi- " sions made for Mrs Dixon by the marriage-contract were, at the date of " that contract, so inadequate with reference to the state of Mr Dixon's " fortune at that time, as to render the discharge given a donation by the " wife, liable to revocation and reduction; and, 2d, Whether, in point of " law, the date of the contract, or the time of the testator's death, must " be taken as the rule for determining the question, Whether there was " such inadequacy or not; and what effect the additional provisions made " for her by other deeds may have on any such question. If the Lord Ordi- " dinary had thought it necessary to enter on this part of the case, he should " have been of opinion that the matter of fact, with relation to the state of " Mr Dixon's fortune at the date of the contract, should be first ascertained. " But the defenders having expressed their desire to have judgment on the " question, Whether, in the circumstances, the reduction was at all competent, " he has felt it to be his duty to give out the interlocutor, which, after con- " sidering a most elaborate debate, and examining all the documents referred to, he had previously prepared.

Dixon v. Fisher. 22d June, 1841. Statement.

" parties' procurators thereon, and made avizandum,
" Finds, that the question raised by the original sum-
" mons in the name of the deceased Mrs Dixon and
" William Dixon, as her assignee, and the supplemen-

" The Lord Ordinary is, in the first place, of opinion, that the present " reduction cannot be supported on the ground of certain documents exe- " cuted by Mrs Dixon in 1823 and 1824. The first is a mandate, dated " June 3, 1823, granted to Messrs Tod and Romanes to appear in the " process of multiplepoinding which had been raised. It is signed by Mrs " Dixon, by Mrs Whitehead, who had expressly discharged the legitim by " marriage-contract, by Miss Dixon, and Mrs Mann, and by William Dixon " himself. It appears to the Lord Ordinary that the authority thereby given " to claim 'our legal shares of said succession,' simply meant that they should " claim what was due to them respectively by the deeds of settlement. Mrs " Whitehead could claim nothing else; and as little could Mrs Dixon without " taking some other proceeding. But the mandate was surely any thing but " a universal rejection of the provisions of the settlement, and an assertion of " rights at common law as opposed to it.

" The deed of revocation of 12th March, 1824, may seem to deserve more " attention. That deed was certainly produced under very extraordinary " circumstances. But it may be sufficient for the Lord Ordinary to say, that " on full consideration, he thinks that it must be regarded as entirely a latent " instrument which was never acted on, but, on the contrary, was entirely " superseded by the transaction which followed between Mrs Dixon and the " general disponees and executors of her husband.

" It is indeed evident, that if the attempt now made to claim jus relictæ in " the name of Mrs Dixon depended on any simple act of revocation by her, " the title to maintain such a claim would not be vested in William Dixon, " but in Miss Lilias Dixon, who is the executrix of her mother: and that " such a claim could not be maintained against William Dixon is very " clear. At any rate, if in point of fact, Mrs Dixon did subsequently accept " of the provisions made for her by the settlements of her husband, and dis- " charged them, the question, What shall be the effect of such acceptance " and discharge, cannot be affected by such a latent instrument, inconsistent " with what she actually did.

" The material question, therefore, is, What was the true nature of the " transactions between Mrs Dixon and her two sons in 1826, and following " years, with reference to the possession which she had previously obtained " of property conveyed to her by her husband's deeds? For it is clear, that " the present action is not an action for the benefit of Mrs Dixon or of her " executrix, but simply a proceeding adopted by William Dixon, in order to " lessen the amount of the fund of legitim claimed by Mrs Fisher against " him, as the disponee and executor of their father. If he obtained a title " to make such a claim for his own benefit, whether in his own name, or in " that of Mrs Dixon, by the deeds of 1826, that title could not be altered by " the mere bringing of the reduction in Mrs Dixon's name, or by the terms " in which the summons may be expressed. And if he did not obtain such

" tary summons in the name of the said William Dixon, " the pursuer now insisting, depends mainly on two " points: — 1st, Whether the contract of marriage " entered into by Mrs Dixon and her husband, the late

---

" a title by the transactions in 1826, beyond all doubt, any right to set aside " the marriage-contract, to repudiate the settlement, and to claim jus relictæ, " which Mrs Dixon might previously have had, was completely and effec- " tually discharged by the deeds which then passed between the parties.

" The most material deeds are the deeds of agreement, 28th February, " 1826, and the deed of transfer of the Monkland Canal shares of the same " date. It is evident that Mrs Dixon was previously in possession of the " forty canal shares, valued at L.4000, or L.4400. She had right by " the settlements to an annuity, to the liferent of a house with twenty-two " acres of ground and other advantages, to the whole household furniture, " &c., and to two shops in Glassford Street, conveyed to her by her hus- " band. Now, without going much into details, the Lord Ordinary can " find nothing in the deed of agreement that has the least resemblance to a " repudiation of the provisions of the settlement. The deed proceeds on no " such narrative; and, on the contrary, her right in the canal shares is ex- " pressly acknowledged, and a transfer of them is executed by herself, as of " property conveyed to her by her husband, and held by her 'immediately " 'before the execution hereof.' The two shops in Glassford Street are " recognized as belonging to her; and in these she obtained infeftment. Her " right to the furniture is also acknowledged; and the whole effect of the " agreement is, that for the transfer of the canal shares, for her annuity of " L.150, for the liferent of the house and ground, and for the discharge " of all her claims, John and William Dixon bind themselves to pay to her " L.5400, at the postponed term of Whitsunday, 1836, with interest from " the death of her husband, to pay her an annuity of L.200, and to " convey to her in liferent a different house and garden. In consideration of " which, she declares herself satisfied with the provisions before mentioned, " in lieu of, and in full of all claims, of whatever nature, whether legal or con- " ventional, she is entitled to from the estate of her husband. Then she " conveys all her rights to John and William Dixon, and binds herself to " execute revocations, and all other deeds necessary for making the same " effectual. And she acknowledges to have received since her husband's " death, 'the sum of L.1569, 16s. to amount of the sums provided to her as " 'aforesaid;' which must mean sums provided to her by the settlements, " because till this deed was executed nothing else had been provided to her.

" The Lord Ordinary is of opinion, that this deed imports an acceptance, " and not a repudiation, of the provisions of the settlement. No doubt it is " an arrangement by which those provisions are discharged on certain consi- " derations. The defenders state, that it arose out of the difficulties in which " John and William Dixon were at that time, which led to the trust-deed " executed by them in the same year; and the Lord Ordinary thinks that " it probably was of that nature. But, independently of this, it was " manifestly a transaction which proceeded on the basis, that Mrs Dixon

DIXON v. FISHER. 22d June, 1841. Statement.

" William Dixon, in 1809, and in particular the clause " thereof, whereby Mrs Dixon, in consideration of the " provisions settled upon her by the said contract, in the " event of her surviving her husband, accepted of the

---

" did assert her claim to all the provisions of the settlement; that she was " actually in possession of a part of the property, and exercised the rights of " a proprietor in it; that no repudiation had taken place; and that the parties " had never entered on any consideration of what her claims might have been " if she had rejected the provisions of the settlements, and claimed terce and " jus relictæ.

" After this, John and William Dixon conveyed their estates to Mr Cuth- " bertson as trustee, and it is apparent, that in that transaction it was " assumed that the settlement was binding on Mrs Dixon, and no supposi- " tion was suggested that any other claim could be made in her right.

" Mrs Dixon was infeft in the Glassford Street shops on the 23d March, " 1827, expressly on the conveyance by her husband, than which it is not " easy to conceive a stronger act of acceptance of the provisions made by his " deeds. These houses had from the first been recognised as the property " 'of Mrs Dixon' in the books of John and William Dixon. See entry, " October 31, 1825. Then, with regard to the other provisions, there is " the following entry: — 'September 30, 1828. — Stock Dr. to sundries " 'for the following legacies, in terms of the disposition and settlement of " 'the late Mr Dixon, viz. To Mrs Dixon, Govanhill, her legacy, L.5400. " 'Do. An equivalent for her annuity of L.200, L.4000,' and throughout the " accounts this debt is substantially stated in the same manner.

" In May, 1827, an agreement was entered into between John and Wil- " liam Dixon, by which John, for considerations, conveyed to William all his " rights and interest as joint disponee and executor of their father. In that " transaction, it is most clear to the Lord Ordinary, that Mr John Dixon, at " least, had not the slightest conception that the transaction between them " and Mrs Dixon had the effect of conveying to them any right or title to " repudiate the settlement in her name, or to claim jus relictæ as her " assignees, and he has accordingly stated the contrary, in the most positive " terms, in his defences to this action. But the deeds speak for themselves. " When it became necessary that Mrs Dixon should directly discharge Mr " John Dixon of all her claims, both the letters which first passed, and the " formal deed of discharge, are perfectly distinct and explicit, as discharging " the provisions made by the deeds of settlement.

" Without going into farther particulars, or enlarging on the application of " these facts, the Lord Ordinary thinks it completely established, that Mrs " Dixon had finally and irrevocably recognized and accepted the provisions " made for her by the settlements, and that, if there had ever been any " serious thoughts of revoking and reducing the discharge of the marriage- " contract, it had been entirely abandoned, and the chequer closed against it " by the acts and deeds of Mrs Dixon herself.

" The idea seems to be entertained, that Mrs Dixon could, at one and the " same time, accept of the provisions, take what was equivalent to payment of

" said provisions, as in full of all she could ask or claim " by or through the decease of the said William Dixon, " and renounced the legal provisions she might be en- " titled to in that event, was, upon the death of the said " William Dixon, liable to revocation by Mrs Dixon, on " the ground that the provisions thereby made in her " behalf were so greatly inadequate as to render such " her acceptance and renunciation in law donatio inter " virum et uxorem; and, 2d, Whether the said Mrs " Janet Smith or Dixon did competently and effectually " repudiate the provisions made for her by the said con- " tract, and other deeds of settlement subsequently exe- " cuted by the said William Dixon, revoke the accep- " tance and renunciation expressed in the said contract, " and prefer her claim to her legal provisions as the " widow of the deceased, against the general representa- " tives of her husband: Finds, That the first of these " points depends, or may depend, on matter of fact, on " which the statements of the parties respectively are

---

" them, and grant a discharge in full, of these, and all her claims, to the exe- " cutor, and yet reserve, or rather convey, to him a right to reverse the whole " proceedings, to repudiate the settlement, and revoke and reduce the mar- " riage-contract in her name; in other words, to make the discharge which " she had granted to her husband, and confirmed to his executor, in full satis- " faction, operate in favour of the husband's representative, against the child " or children claiming legitim. The Lord Ordinary is of opinion that this is " incompetent. It brings the case exactly to the point which occurred in " the case of Andrews v. Thomson or Sawer, March 2, 1836; and therefore, " instead of going into any detailed explanation of the principle, the Lord " Ordinary will simply refer to the report of that case, and the full note of " Lord Corehouse upon it. The facts of the two cases are not exactly the " same; and, in particular, Mrs Dixon has not in direct terms done what was " attempted by Mrs Sawer in that case. But they are the same in principle; " and the Lord Ordinary is of opinion, that the judgment must be the same " in both. For if Mrs Dixon had effectually accepted the provisions, and " discharged them by the deed 1826, the Lord Ordinary thinks it very clear, " that nothing which she may have been induced to do afterwards could alter " the state of the case.

" J. W. M."

DIXON v. FISHER. 22d June, 1841.

Statement.

" essentially opposed: Finds, That the second question " must be determined by a due consideration of the " documents in process: Finds it established that the " said Mrs Dixon did obtain possession of valuable " property, provided to her by her husband, in virtue " of the conveyances expressed in his deeds: Finds, " That, by deed of agreement on the 28th February " 1826, between the said Mrs Dixon and her sons, John " Dixon and William Dixon, the general disponees and " executors of her deceased husband, the said John and " William Dixon bound themselves to pay to Mrs " Dixon the sum of L.5400 at the terms specified, which " sum of L.5400 is, in the accounts of these parties, and " in various other documents, uniformly described as a " legacy or provision to which she had right under the " settlements of her husband, — to secure her in an " annuity of L.200, and in the liferent of a house " specified, with certain other benefits, — to deliver to " her the whole household furniture, plate, &c. of her " husband, which furniture, &c. was also provided to her " by the deeds of her husband; and by which agreement " they farther stipulated that she should have right to " two shops in Glassford Street, which shops were ex- " pressly conveyed to her by her husband's settlement, " and in which she obtained infeftment in virtue thereof: " In consideration of which obligations, the said Mrs " Dixon declares herself satisfied therewith, 'in lieu of " 'and in full of all claims of whatever nature, whether " 'legal or conventional, she is entitled to,' from the " estate of her husband, and gives up, dispones, con- " veys, and renounces, to and in favour of the said John " and William Dixon, &c., all such claims and rights " in whatever way conceived, whether legal or conven- " tional, and binds herself to execute all revocations,

" conveyances, or other deeds necessary for investing
" them in the full right thereof, with power to follow
" forth and make the same effectual; and she farther
" acknowledged, that since her husband's death she had
" received L.1569, 16s. ' to account of the sums provided
" ' to her as aforesaid:' Finds, That by a deed of trans-
" fer of the same date, the said Mrs Dixon assigned
" and transferred to the said John and William Dixon
" forty shares of the Monkland Canal which belonged
" to the deceased, ' and were conveyed by him in my
" ' favour by the disposition and asignation' specified,
" with the dividends due thereon, to be held subject to
" the same rules and on the same conditions ' that the
" ' deceased William Dixon or myself held the same
" ' immediately before the execution hereof;' — which
" deed of transfer contains a clause, declaring it to be
" without prejudice to her legal rights, in respect of the
" property of the deceased: Finds, That the said deed
" of agreement neither proceeds on the narrative that
" Mrs Dixon had, at any time preceding the date of it,
" repudiated the settlements of her husband, and revoked
" her obligation under the marriage-contract, nor does
" itself either express or import such a repudiation and
" revocation: Finds, on the contrary, that it proceeds
" on the express assumption of specific rights vested in
" her, in virtue of the said settlements, and that the said
" deed of transfer is expressly founded on her title and
" possession, vested in her by the said deeds: Finds,
" That by the force of the said deed of agreement, the
" said John and William Dixon, as the disponees and
" executors of the deceased, stood completely discharged
" of all claims competent to Mrs Dixon, whether under
" the settlements of her husband, or at common law,
" and that she had finally accepted of the provisions

Dixon v. Fisher. 22d June, 1841. Statement.

" specified in the said agreement, as in full of all that " she could claim: Finds, That it was not thereafter com- " petent to the said Mrs Dixon herself to make any " claim to her legal provisions, or to repudiate the pro- " visions made for her by the settlements of the deceased, " or to revoke the obligations of the marriage-contract: " And finds, That it was not competent to the said " John and William Dixon, after having finally tran- " sacted and settled with the widow on such terms, either " in their own names, under any general title as assig- " nees, or in her name, to repudiate for her the settle- " ments of the deceased, or to revoke or reduce the " marriage-contract, to the effect of thereby altering or " affecting the rights of other parties interested in the " succession: Finds it farther established, that there- " after a transaction took place between John and " William Dixon, whereby the former, upon certain " considerations, renounced his rights as one of the " disponees and executors of his father, and agreed that " the said William Dixon should have right to the " whole property, subject to the conditions therein ex- " pressed: And finds, That the said agreement, and the " express discharge which was thereafter executed by " Mrs Dixon, and the other persons therein interested, " in favour of the said John Dixon, proceeded on the " assumption that Mrs Dixon had not repudiated the " provisions made for her by the deeds of her husband: " Finds, That in the circumstances, Mrs Dixon having, " in the first instance, accepted and taken possession of " various special subjects of great value, to which she " had right by the deeds of her husband, and having " thereafter transacted with his disponees and execu- " tors, and finally discharged all her claims against " the estate, it was not thereafter competent, either to

Statement.

" her or to any one in her right, to repudiate or reduce " the settlements of her husband, or the obligations " undertaken by her in the marriage-contract, on the " ground of inadequacy, or on any other ground set " forth in this record: Therefore, sustains the defences " to this effect; but before pronouncing decree of " absolvitor, appoints the cause to be enrolled, and in " the meantime reserves all questions of expenses.

" J. W. M."

The cause was subsequently enrolled, and the Lord Ordinary, on 26th June, 1838, pronounced the following interlocutor:—" The Lord Ordinary having called " the cause, and heard parties' procurators, sustains the " defences, repels the reasons of reduction, and assoil- " zies the defenders from the conclusions of the actions, " original and supplementary, and decerns: Finds the " defenders entitled to expenses; appoints an account " thereof to be lodged, and remits to the auditor to tax " the same and report."

Judgment of Court, 8th Feb. 1839.

The appellant reclaimed to the Second Division of the Court, who, on 8th February, 1839, pronounced the following interlocutor:—" The Lords having con- " sidered this note, with the whole proceedings, and " heard counsel thereon, adhere to the interlocutors of " the Lord Ordinary complained of, and refuse the " desire of the note; of new, find expenses due to the " defenders, allow the account to be given in, and, " when lodged, remit to the auditor to tax and report."

Against the interlocutors of the 22d and 26th June, 1838, and 8th February, 1839, an appeal was taken.

The Appellant.—The provisions made by the testator

DIXON v. FISHER.

22d June, 1841.

Appellant's Argument.

in favour of his widow were greatly inferior in value to those she would have been entitled to by law; this is to be assumed. The widow, on her husband's death, had a right to renounce the conventional provisions, and betake herself to her legal claims. The acceptance of these rights in the life of her husband was no bar to such renunciation, for this acceptance, the provisions being smaller than the legal claims, was itself revocable by the widow, as importing donatio inter virum et uxorem.

But it is admitted that the widow had every desire to support the deeds executed by her husband, and was exceedingly offended by the conduct of the respondents in attempting to disturb them. It was no part of her intention, therefore, to recall her acceptance of these provisions with a view to any personal benefit to herself, and still less with a view to benefit the respondents. Her sole object was to defeat the measures of the respondents. Had she abided by her acceptance of her husband's provisions, the effect would have been to create a bi-partite division of his estate into legitim and dead's part, instead of a tri-partite division, and thereby to increase the amount which the respondents would have been entitled to receive. She therefore resolved to claim her legal provisions, and to make them over to her sons, so as thereby to effectuate, as far as in her power, the general conveyance in their favour, contained in the deed of April, 1817. This she carried into effect, — 1st, By the mandate to appear for her, and make her legal claims in the multiplepoinding, though nothing was done under it by reason of the state of proceedings in that case; 2d, By the deed of 12th March, 1824, she expressly revoked her acceptance of the conventional provisions; that that deed was not delivered mattered not, as Mrs Dixon had herself the material

interest in it, (Ersk. III. 2. 43;) 3d, By the deed of 28th February, 1826, she conveyed to the sons her whole legal or conventional claims, and bound herself to execute all revocations or other deeds necessary for making the conveyance effectual; 4th, On 28th February, 1826, she likewise executed an assignation of the Monkland Canal shares, under a declaration that it was done without prejudice to her legal rights against her husband's estate; 5th, On the 21st March, 1830, she gave a mandate for raising the present action of reduction; and, 6th, In the summons of reduction she expressly revoked her acceptance of her husband's provisions.

II. The general conveyance in the deed of April, 1817, on the supposition that the widow would renounce her jus relictæ, vested that part of the executry applicable to it in the disponees of that deed. Henderson v. Henderson, Mor. 8,199; Collier v. Collier, 11 S. and D. 912; Robertson v. 16th January, 1813, not reported. On the death of the testator, the widow's jus relictæ vested in her ipso jure. Even assuming that the deed of 28th February, 1826, was an acceptance of her conventional provisions, this could only amount to a ratification, in favour of the disponees, of the conveyance in the deed of April, 1817, and could not confer any benefit upon a third party.

But, III. The deed of February, 1826, could not be held to be an acceptance of the conventional provisions. The deed itself did not either express or imply this by its terms, and what the widow obtained under it was different both in nature and value from the provisions made by her husband.

IV. The widow was not precluded by any thing that had been done by her previous to the deed of February,

DIXON v. FISHER. 22d June, 1841.

1826, from revoking her acceptance of her husband's provisions. 1. Even assuming that the monies acknowledged by her in that deed to have been received by her, arose from the rents of the Glassford Street houses, and the Monkland Canal shares, the conveyance of these properties by her husband was made without any condition as to its acceptance, such acceptance, therefore, could not have any effect upon her jus relictæ, Ersk. III. 9. 16. Besides, the amount of her legal claim was still matter of uncertainty, by reason of the litigation in the process of multiplepoinding; any intermeddling, therefore, with the income of these properties could not operate in prejudice of her right to make the claim, Johnston *v.* Paterson, 4 S. and D. 234. But, 2. There is no evidence to shew that the payments to the widow arose from any particular source, or were made on any particular account; while the evidence does shew, that the rents of the shops, and the dividends upon the shares, were received by the appellant himself and his brother John.

Appellant's Argument.

V. If the conveyance of April, 1817, aided by the deed of 28th February, 1826, vested in the disponees of the former deed the dead's part and jus relictæ, any thing done subsequently to the latter deed cannot have any effect upon the right so vested, to operate against it in favour of the claim of the respondents. The infeftment taken by the widow in the Glassford Street property, the documents founded on in regard to the release of John's liability, the entries in the appellant's books, and the defence to this action by John Dixon, are wholly irrelevant to the question at issue.

22d June, 1841.

Ld. Chancellor's Speech.

LORD CHANCELLOR. — My Lords, Before I examine the grounds upon which the Court of Session have held,

22d June, 1841.

Ld. Chancellor's Speech.

that the pursuer cannot maintain this suit, I cannot but observe the situation of the parties litigant. The question being, Whether Mrs Janet Dixon, the widow, had by her acts precluded herself from claiming those rights and interests out of her late husband's property, to which she would otherwise have been entitled.—She institutes the suit jointly with her son William, which William is one of the general disponees of the husband of Janet, and his father, and claiming through John, the other general disponee, was entitled to the whole of the father's property, subject only to the claims of the younger children, and of the mother. And the object of the suit is to have it declared, that the mother is entitled to her legal claims against the estate, and to repudiate and set aside all acts and deeds by which she may have accepted the conventional provisions made for her by her husband, in lieu of such legal claims. But all those acts and deeds, so sought to be set aside, were between the widow and her sons, whose right is now vested in the pursuer, William; and both join in this suit. It is true, that the younger children are interested in the effect of those acts and deeds, as they may affect the amount of the legitim, and what such effect may be is in question in another proceeding. The question in the present suit is, Whether the widow can, after what has taken place, renounce her conventional provision; and the object is, if necessary, to set aside what has so taken place, in order to enable her to claim such legal right. To this suit the younger children are parties, and, so far as the question is, Whether, after what has taken place, the widow can renounce her conventional provisions, and claim her legal right, the form of the suit may be very proper, but so far as the object is to set aside these transactions, there appears to be a

DIXON v. FISHER.

22d June, 1841.

Ld. Chancellor's Speech.

peculiar impropriety in the form of the suit. All the parties to a transaction join in praying that it may be set aside, because the result of it may benefit a third party; but such third party was a total stranger to the transactions sought to be set aside, and all the grounds upon which that relief is prayed, exist only as between the widow and the sons, the general disponees — but as between them no relief is asked, all the interests of both sons, and of the widow, being vested in the pursuer, William. How such transactions affect the rights of the younger children may be a fair question; but that such rights are to be investigated without reference to these transactions, or how, as against them, these transactions are to be set aside, appears to me very difficult to comprehend. Certainly, in this country no such proceeding could be allowed. But I proceed to consider what the facts are upon which this relief is prayed.

By the deed of 1809, the husband secured to his then wife L.150 per annum, and the house of New Palace Craig, and twenty-two acres for life, and the furniture, and three of his best cows, she consenting to renounce the legal provisions to which she might be entitled. By a deed of 11th April, 1817, he gave her L.1000, in addition to the former provisions, in full of all she could ask or claim in and through his decease. By a deed of 22d November, 1821, he secured to her two shops in Glasgow, and forty canal shares, but the gift was not expressed to be in lieu of her legal rights. The husband died in October, 1822. These provisions for the widow, being all under post-nuptial settlements, it may be assumed that upon her husband's death it was competent for her to repudiate them, and to claim her terce and jus relictæ. But some of these provisions were given upon express condition of her renouncing all such

rights, and it is clear that she could not approbate and reprobate such gifts, or, in the terms of the English law, she was bound to elect between them and the legal rights they were intended to supersede. What ought to be evidence of such approbation or election is a question of fact, and may be proved either by the general conduct of the party in her dealings with the property, or by express declaration.

In considering the evidence upon these points, it is expedient to keep in mind, that very soon after the death of the husband, the daughter, Mrs Fisher, had intimated an intention of repudiating the provision intended for her by her father, and of claiming her legitim, which led to the suit of multiplepoinding in 1823. The extent of this claim, which was earnestly resisted by the mother, might much depend upon whether the mother accepted or repudiated her jus relictæ; and to this may be attributed much of that which has been relied upon as evidence of her not having so repudiated it. But still the fact remains to be examined, Did she, or did she not, accept the provisions intended for her by her husband. If she had not intended to accept those provisions, her title to terce and jus relictæ accrued upon her husband's death in 1822. But there is no trace of any steps being taken to act upon, or enforce any such rights; but there is proof that, to a certain extent at least, she dealt with the subject of her husband's provisions, and such proof as there is of the dealings of the mother and her sons with the property, is referable only to her title under her husband's provision, and not to her title to terce and jus relictæ.

The deed of the 28th of February, 1826, admits that she had received from them L.1569, 16s. "to

Dixon v. Fisher. 22d June, 1841. Ld. Chancellor's Speech.

"account of the sums provided for her as aforesaid." That deed, — though, for the purpose of defeating the claims of the daughter, Mrs Fisher, ambiguous terms were introduced into it,—was clearly a settlement between the mother and the sons, upon the footing of the husband's provisions. It could not, indeed, be otherwise, it being a fact admitted on both sides, that she was offended at her daughter's attempt to disturb the provisions made by her husband.

That such was the principle upon which this settlement proceeded, is apparent when it is considered, that what she would claim under her provisions was, — 1st, An annuity of L.150; 2d, The liferent of the house and grounds of Palace Craig; 3d, The furniture; 4th, L.1000; 5th, Two shops in Glasgow; 6th, Forty canal shares; 7th, Three cows. And what she took under the agreement of 1826, was, — 1st, An annuity of L.200; 2d, The liferent of the house and garden at Govan Hill; 3d, The furniture, &c.; 4th, L.5400, she giving up to her sons the forty canal shares; 5th, The two shops in Glasgow; 6th, The keep of three cows; 7th, The use of a carriage and horses.

It is impossible to refer this arrangement to her title to terce and jus relictæ. It is an acceptance of, and dealing with, the conventional provisions of her husband, as between herself and her husband, and if so, there is no ground for relieving her from her own act upon any ground of ignorance or surprise. If she accepted these provisions in lieu of her legal claims, as between herself and her sons, it was not competent for her, as against her daughter, to keep alive those claims; but to the attempt so to do must be attributed the mandate of the 3d of June, 1823, and the deed of revocation of the 12th of March, 1824, of which there is no proof of its

having ever been delivered or used; and the whole conduct of the parties proves, that it was not intended that it should have any operation as between the mother and her sons.

Ld. Chancellor's Speech.

It appears to me for these reasons clear, that it is now too late for the widow to repudiate the settlement of her husband, and that the pursuer has no right to impeach the transaction which he seeks to set aside, and that the judgment of the Court below was right as pronounced in the three interlocutors of the 22d and 26th June, 1838, and 8th of February, 1839. I move your Lordships, therefore, that the interlocutors be affirmed with costs.

Judgment.

The House of Lords ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

[22*d June*, 1841.]

(No. 15.) WILLIAM F. HOME, Esq. of Billie, and DAVID MILNE, Esq. Judicial Factor on the Estate of Billie, Appellants.

[*Sir F. Pollock — Knight Bruce.*]

JOHN PRINGLE, Trustee of the deceased WILLIAM PRINGLE, Respondent.

[*Lord Advocate — Pemberton.*]

JOHN HUNTER and Others, Representatives of JAMES HUNTER deceased, Respondents.

[*Sir W. Follett — W. Buchanan.*]

Trust.—The appointment by trustees of one of their number to be factor to the trust, is not a breach of trust, so as per se to make those appointing liable for the acts of the factor, as if the acts of a co-trustee, for which they would be liable; but will infer against those appointing a liability for the acts, as if those of their agent.

Id.—The mere fact of trustees allowing balances to remain in the hands of their factor at the annual settlement of his accounts, where there must necessarily have been current accounts between the trust and third parties, without any knowledge by the trustees of fraud, in contriving that the balances should be greater than necessary, will not infer against the trustees liability for the balance owing by the factor at the ultimate settlement.

Id.—General dealing between trustees and their factor held not to infer a liability by them for the balance upon the factor's accounts, lost to the trust by the factor's bankruptcy.

Id. — A trustee does not, by accepting the office of cashier

to the trust, incur any liability, in regard to the management of the trust, beyond that to which he was already subject qua trustee.

Id.—Trustees ought not to have any allowance or salary in respect of offices held by them under the trust; but circumstances under which the House of Lords refused to disturb accounts, in which such allowances had been passed.

Costs.—Though affirming judgment, the House of Lords will not meddle with costs below, although the question may have been brought up by cross appeal.

ON 16th July, 1816, George Home executed a deed of settlement, by which he conveyed to David Renton, William Pringle, and John Renton, and such persons, as might afterwards be appointed by him, the lands of Billie and others, upon trust, to settle the lands by entail upon a series of heirs, (of whom the appellant was the institute,) after payment of debts and legacies, the former of which amounted to nearly L.100,000. 22d June, 1841. Statement.

The powers given to the trustees were expressed in the following, among other clauses: — "With power to "name and remove factors, from time to time, with "such powers, and liable to such diligence as the said "trustee or trustees shall think proper, and to give "such salaries to the factors, and gratifications to any "other persons who shall be employed in relation to the "premises, as the said trustee or trustees shall think "expedient at the time, and to settle accounts annually "with the said factors, and upon payment of what shall "be found due, to exoner and discharge them of their "intromissions and management; and within six months "after each clearance with the factors, the said David "Renton, William Pringle, and John Renton, or other "trustee or trustees for the time, shall make up the

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

"accounts of his or their intromissions, during the "period of the factor's accounts, and get the same "examined and approved of by an accountant of cha- "racter in Edinburgh; and if the accounts are approved "of by the said accountant, such approbation is hereby "declared to operate as a full exoneration of the said "trustee or trustees, for their whole management during "the currency of said account: Secundo, With power to "the said David Renton, William Pringle, and John "Renton, or other trustee or trustees acting for the "time, either to compromise, transact, or agree, or to "submit and refer, any questions that may arise betwixt "them, and any other person or persons, touching the "execution of the said trust; which transactions or sub- "missions, with the decreet-arbitral to follow thereon, "are hereby declared valid and sufficient, to all intents "and purposes whatsoever: As also, with power to him "and them to sue and insist in all actions that shall "be found necessary for effectually answering the pur- "poses of the said trust: It is hereby provided and "declared, that in case any of the said three trustees "should fail to accept, or that they should all die "before the execution of the said trust-right, the same "shall not thereby become void, but shall subsist, "with the infeftments thereon, until all the ends, uses, "and purposes thereof shall be fully completed; and "it shall be competent and lawful for any of the said "three trustees herein named, acting for the time, when "he shall think it proper, to nominate and appoint, "from time to time, such a succession of other trustees "for executing the said trust as he shall think neces- "sary; and which trustees, so to be named by the said "acting trustee, shall be as fully invested in the right "of the whole lands, and others hereby conveyed, and

" in all the powers hereby committed to the trustees " before named, as if they had been expressly named " and appointed trustees by the said deed, or as the said " trustees herein named might and could have done, " had they lived, and continued to execute the trust " hereby committed to them; with power also to the " said acting trustee for the time, to appoint how many " of the trustees, so to be named by him, shall be a " quorum, in case he should think proper to name two " or more persons to act together: As also, it is de- " clared that the said David Renton, William Pringle, " and John Renton, or other trustee or trustees named, " or to be named, as aforesaid, shall noways be obliged " to do diligence, otherwise than as he or they shall " think fit; nor shall he or they be liable for omissions, " but only each of them for himself, and his own actual " and personal intromissions; nor shall they be farther " liable for their factors, than that they shall be habit " and repute responsible at the time of entering upon " their office."

Such of the purposes of the trust as it is necessary to notice, were expressed in these terms:—" For payment " of all the public burdens affecting the estates hereby " conveyed, and the due and lawful interest of all " bonded debts, or other debts due by the said George " Home, and of all necessary charges and expenses, to " be disbursed by the said trustees, or their factors, " in exccuting the said trust-right; which charges and " expenses are to be taken on the honest word of the " acting trustee or trustees for the time, and not to be " subject to challenge on any account or pretext what- " ever; and for payment of such salaries and gratifica- " tions as the said trustees shall give to factors, lawyers, " arbiters, or others, who shall be employed with rela-

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" tion to the management of the present trust, and of " the yearly sum of L.100 sterling, as a gratification " to the acting trustee or trustees, for their trouble " in the management, — it being hereby declared, " that in case there shall be at any time more than " one acting trustee, the said yearly sum of L.100 " sterling shall be equally divided among the said " acting trustees."

On the 6th day of August, 1819, George Home executed a supplementary trust-disposition, by which he revoked the nomination of David Renton and John Renton, and conveyed the lands of new to William Molle, William Pringle, and James Hunter, upon the trusts of the original deed: — " Declaring that a majo- " rity of my said trustees, accepting and surviving, " shall at all times form a quorum, for executing the " purposes of the said trust, ratifying and approving " the said nomination; and declaring that the said " William Molle, William Pringle, and James Hunter, " as trustees foresaid, shall have the same powers, and " be subject to the same declarations, conditions, pro- " visions, and reservations, as if named and appointed " as such, in gremio, of the foresaid trust-right, to " which this supplementary trust-deed is declared to " have an express relation, excepting in so far as " hereby altered."

On the same day, 6th August, 1819, George Home, by his last will, reciting the two deeds of 16th July, 1816, and 6th August, 1819, bequeathed his whole moveable estate to Molle, Pringle, and Hunter, as trustees, for payment of certain legacies and annuities.

The maker of these instruments died on 10th February, 1820, and thereupon Molle, Pringle, and Hunter, accepted of the office of trustees, and entered upon the

execution of the trusts. Molle was a proprietor of considerable landed estates in the neighbourhood of the trust lands, and likewise practised in Edinburgh as a Writer to the Signet: Pringle was a Depute-Clerk of Session, and principally resident in Edinburgh: and Hunter was a Writer, practising in the town of Dunse, in the neighbourhood of the trust lands.

On the 10th of March, 1820, Molle and Pringle wrote from Edinburgh to Hunter, and also to the appellant, intimating that the first meeting of the trustees would be held on the 16th of that month. A meeting was accordingly held on that day, and was attended by Molle, Pringle, and the appellant: Hunter being absent, in consequence of communications from the appellant, inducing him to think that he, the appellant, would not attend, and that he would procure the meeting to be adjourned to a farther day.

At this meeting the appellant proposed himself to be factor for the trustees. Molle and Pringle did not assent to this, but appointed Molle to be factor, with a salary of L.180 a year; and on the 22d March, 1820, they executed a formal deed of factory in his favour. They likewise appointed Pringle to be cashier of the trust, with a salary of L.50 a year; Messrs Molle, Turnbull, and Brown, Writers to the Signet, a firm of which Molle was the chief partner, to be the law agents of the trust in Edinburgh; Hunter to be the agent in the country; and Brown, the nephew of one of the members of the firm of Molle, Turnbull, and Brown, to be the accountant. At the date of these appointments, Molle was possessed of considerable landed property and respectable practice in his profession, and he was otherwise of undoubted credit and respectability.

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

William Foreman Home, as first heir of entail of the trust lands, brought action against John Pringle, the trust-disponee and executor of William Pringle and his legal representatives; John Hunter, and the other representatives of James Hunter; and William Molle, and Alexander Low, trustee on his sequestrated estate, — setting forth the deeds executed by George Home; that Molle had never been required to find caution for his intromissions as factor; that his accounts had not been annually settled, but large balances had been retained by him and applied to his own purposes, with the knowledge of his co-trustees, and more especially of Pringle, as cashier; that notwithstanding of these defalcations, Molle was allowed to retain his office of factor; that with the knowledge and connivance of Pringle and Hunter, the grossest system of malversation and neglect had prevailed in every department of the trust; that Pringle and Hunter, after endeavouring to obtain payment of the balances owing from Molle, at last took alarm on their own account, and on the 29th of October, 1830, recalled the factory in his favour; that on the following day, Molle intimated his bankruptcy, and admitted that the final balance owing from him amounted to L.5729, after taking credit for about L.11,000 paid for salaries and other charges; that these charges were illegal, and, if disallowed, would thus make the balance owing to the estate amount to L.16,729; that in December, 1830, James Hunter threatened proceedings against William Pringle, to make him liable for Molle's defalcations, in respect of his omission as cashier to make him regularly account; that in consequence of these proceedings, Pringle, on 7th January, 1831, denuded of the trust in favour of Hunter, — Molle having previously taken the

same step, — and thereafter Hunter dropped farther proceedings for recovery of the balances owing to the trust estate.

22d June, 1841.

Statement.

Upon this narrative the summons concluded for payment of the admitted balance of L.5749, and also of L.11,000, as improperly taken credit for; that it should be found that the trustees were not entitled to make any charge for trouble, as cashiers, factors, or agents, and that they had forfeited all claim to the allowance of L.100 per annum, given by the trust-disposition; that the defenders should be ordained to pay L.10,000 for malversations committed by the trustees, and to hold count and reckoning of their intromissions since the commencement of the trust, and to pay whatever balance might appear by the accounting to be owing to the estate.

The gross rental of the trust lands during the management of the trustees, varied from L.7234, 11s. 6d., the amount in the year 1820, to L.7900, 12s. 1d., the amount in the year 1829, giving an average of L.7635, 19s. 7d. This revenue was receivable from seventy-nine tenants, and one hundred and eight feuars. The personal funds left by the truster amounted to L.19,520, 9s. 6d.

The debts and legacies left by the truster, for payment of which the trust estate was made applicable, amounted to L.87,987, 11s. 11d.; and in respect of these, annual payments of interest and otherwise had to be made to thirty creditors, twenty-two annuitants, and seventeen legatees.

With regard to the averment in the summons, that Molle's accounts as factor had not been annually settled, and that large balances had been retained by him, the evidence shewed, that the accounts of Molle as factor,

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

of Pringle as cashier, and of the law agents, had been made up in each year to 31st December, and had been rendered at least within the year subsequent to that to which they were applicable, and that they had been regularly examined and docqueted by the accountant within periods, after the accounts had been rendered, varying from eighteen months to two years and upwards. The following table shews the dates at which the accounts were rendered and reported upon by the accountant: —

	Accounts transmitted to the Auditor.	Dates of Auditor's Reports.
1820.	1821, May 1.	1822, July 30.
1821.	1822, July 19.	1824, Nov. 30.
1822.	1823, Aug. 7.	1824, Dec. 4.
1823.	1824, July 5.	1825, April 13.
1824.	1825, April 22.	1826, Feb. 3.
1825.	1826, July 28.	1827, Jan. 15.
1826.	1827, July 14.	1830, August 30.
1827.	1828, July 17.	... ...
1828.	1829, prior to Aug.	... ...
1829.	1830, April 10.	... ...
1830.	1831, Jan. 25.	1832, Jan. 9.

The delay in reporting upon the accounts, as far as appeared, arose from the inability of the accountant to overtake them by other engagements. In regard to the accounts of the factor and cashier, the balances upon them in each year appeared to be as follows: —

Dates of Balances.	Balances due to Mr Pringle.	Balances due by Mr Pringle.	Balances due to Mr Molle.	Balances due by Mr Molle.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1820, Dec. 31,	119 4 7		906 3 4 8	
1821, ...	... ...	18 18 1 8	247 17 0 10	
1822, ...	102 10 8 9	... ...	... ...	983 9 2 8
1823, ...	83 14 6 9	... ...	... ...	764 9 7 7
1824, ...	... .	0 7 9 9	... ...	910 1 1 8
1825, ...	79 1 9 9	... ...	... ...	2258 16 6 8
1826, ...	... ...	3 5 8 8	... ...	1970 2 0 8
1827, ...	32 3 4 8	... ...	... ...	1851 18 2 8
1828, ...	79 11 1 8	... ...	... ...	2172 17 9 11
1829, ...	... ...	2 1 0 6	... ...	1634 3 0 9
1830, Nov. 2,	... ...	... ...	... ...	3775 1 11
—— Dec. 31,	59 7 8 6	... ...	... ...	... ...

In Molle's accounts, made up to 31st December, 1827, he debited himself with L.1970, 2s., the balance on the previous year's accounts, and with interest at four per cent; and in each subsequent year's account, the balance of the previous year, with interest, was debited to him.

With regard to the averment in the summons, as to malversation and neglect of the trust, this was limited to a charge of improper abatements of rent having been allowed to tenants, and the facts as to this were, that the trustees had taken the opinion of land valuators as to the rents for which the lands were let, in consequence of claims of abatement having been made by some of the tenants, and, acting upon the opinions of these persons, had given abatements, amounting in the whole, during ten years, from 1819 to 1829, to L.3319, 16s. 1d. giving an annual average of L.331, 19s. 7d.

The position of the trustees individually, in regard to the matters charged against them, was this, —

The meeting of the trustees were, with few exceptions, held at Edinburgh, where Molle and Pringle chiefly resided, and they were seldom attended by Hunter, his co-trustees having refused to put the trust to the expense of his journies to Edinburgh, unless to attend an annual meeting, at the time at which the accountant's reports should be given in. Accordingly, few of the meetings were intimated to Hunter beforehand, unless business of particular importance was intended to be done, but copies of the minutes of the meetings appeared to have been sent to him from time to time. This arrangement was made subject of complaint by Hunter, in a letter addressed to the agents of the trust, on 9th January, 1821, in these terms: — "I was surprised to find by "your letter of the 22d ultimo, that any meeting had

HOME and another v. PRINGLE and others. 22d June, 1841. Statement.

"taken place under the designation of Mr Home's "trustees, without my receiving the most remote notice "of it. This I was certainly entitled to have had noti- "fied, though I could not have conveniently been "present."

That letter produced an answer from Molle and Pringle on 15th January, 1821, in these terms:— "With regard to your not having had intimation of the "last meeting, we considered it unnecessary, because "we could not think of bringing you to town at "the expense of the trust, and we could not suppose "that you would have come at your own expense. "The business must evidently be done in Edinburgh, "where the majority of the trustees reside; and it is "only on very extraordinary occasions, that we can "ever think of troubling you to come from Dunse, at "the expense of the trust."

On the 10th of April, 1822, the agent of the trustees, in a letter to Hunter, said:—"I am desired to say, that "if you would inform us previously of your intention "of being in town at any time, a meeting of the trustees "would be called on such an occasion." To this Hunter replied on the 12th April, 1822:—"Yesterday's "post brought me your letter of the 10th, accompanied "by copy minutes of Billie trustees. If it could be so "arranged as to have two general meetings in the year, "I would wish to be present at both of them. It was "in the view of Mr Home, that the three trustees "named by him should convene at any meeting to be "held relative to his affairs; and though I am advised "by unexceptionable authority, that meetings held "without due notification being given to me, are "irregular, I have no wish to have any altercation "thereanent. It is, however, fair and reasonable that

"such notification should be given, that I may know, "otherwise than from copies of minutes, what is going "forth in the trust. I shall, however, attend to what "you have been desired to state, and give intimation "when I am to be in Edinburgh on other occasions, that "subordinate meetings may then be held."

On the 28th May, 1822, Molle and Pringle wrote Hunter in these terms:—"Dear Sir, Mr Turnbull "communicated to us your letter to him of the 12th "ulto. We shall certainly give you notice of our "meetings, so that you may have it in your power to "attend; but we do not consider ourselves authorized "to charge the trust-funds with your expenses for com-"ing to town more than once a-year, when L.5 may be "allowed. This annual meeting, we conceive, should "take place when the accountant gives in his annual "report, and when the trustees must arrange matters "for the succeeding year." Here the matter was allowed to rest.

The means of knowledge by Molle's co-trustees, in regard to the balances retained by him, and the conduct pursued by them upon this subject, appeared to be thus:—

1st, In regard to their means of knowledge, the accounts of the different officers of the trust were transmitted to the accountant for audit, and were reported on by him, as shewn in the table which has been already given.

In the notes which were issued by the accountant in April, 1825, upon the accounts ending at 31st December, 1823, there were the following remarks:—

"There is a balance in the factor's hands, at 31st "December, 1823, on the rendered account, of

"L.760 8 0$\frac{5}{6}$

HOME and another v. PRINGLE and others. 22d June, 1841. Statement.

" And there had previously fallen due, of the rents " of crop 1823, the following amounts, part of which, it " is presumed, must have been collected before the end " of the year, viz. —

" Payable at Whitsunday, 1823,	L.220	10	0
" Lammas, . .	475	0	0
" Martinmas, .	1096	18	7
" Christmas, .	383	7	1
"	L.2175	15	8

" The factor should not retain in his hands more " than sufficient to answer the current demands of the " estate. Under this necessary deduction, the rents " should be paid over to the cashier as actually received, " and, of course, no balance should appear in ordinary " cases, in the factor's hands, at the end of the year."

So in the notes issued in February, 1826, upon the accounts ending 31st December, 1824, the accountant observed: — " The auditor has formerly had occasion to " remark to the progressive state of the factor's pay- " ments to the cashier, and to the extent of the balances " which appeared in his hands at the end of the yearly " accounts. And from the factor's answers to the " auditor's last notes on the subject, he anticipates that " there will be no more occasion for remark in future. " There is no improvement in the point alluded to in " the accounts for 1824, which, it is presumed, has " arisen from the last notes not having been communi- " cated in sufficient time to produce their due effect." Molle put an answer upon the notes in these words, — " To be attended to."

In the notes issued in January, 1827, upon the accounts ending 31st December, 1825, there was this entry: —

" Molle's Accounts.

" Credited payments to the Cashier.

" 31st December, 1825, . .	L.260	
" Do. Do. . . .	1000	
	" L.1260	

" These payments were not made to the cashier till the " 3d and 5th of January, 1826, and of course they cannot pass through the report for 1825, without deranging the bank account, and producing confusion. " They will, however, be noticed at the end of the " factor's account. With reference to former remarks, " it is observed that the factor's balance has increased a " little this year. The auditor proposes to have a " meeting with the factor on this subject."

In the notes issued in August, 1830, the accountant observed:—

" Crops 1826 and 1827.

" I.—Account for crop 1826.

" The auditor had formerly occasion, more than " once, to advert to the state of the balances on the " factor's accounts; and the situation of those on the " accounts ending December, 1827, and December, " 1828, compels him to resume the subject. When " the accounts ending December, 1826, were under " audit, the factor suggested that interest at a fair rate " might be added to the balance against him, and this " will no doubt be so far satisfactory; but the auditor " cannot admit this to be a correct mode of accounting; " —besides, it is evident from inspection of the payments to the cashier, that very considerable balances " have been retained by the factor throughout the year, " which are lessened by payments made in December, " and to this extent the statement of interest has not, of

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" course, due effect. The auditor considers it indispen-
" sable that the rents shall be made over to the cashier
" as received, so as no balance may lie in the factor's
" hands more than is required for the current expendi-
" ture of the estate. And in reference to such an
" arrangement, he is of opinion, that a progressive
" statement of the receipts and payments ought to be
" exhibited with the annual accounts, as long ago
" suggested by him. In the meantime, it is proposed
" to debit the factor with interest at four per cent on
" the balances, from 31st December, 1826."

2d, The conduct of the trustees, in regard to requiring payment of the balances owing by Molle from time to time, appeared from the following correspondence: —

On 26th April, 1828, Brown, the accountant, wrote Molle on these terms: — " I beg to mention that I have
" now completed my audit of the Billie trust-accounts
" for the year 1826, and prepared the usual states;
" but, before closing them, it will be necessary that some
" arrangement be come to for the settlement of the
" balance on your accounts. It occurs to me, that the
" best plan is for you now to pay up the balance with
" interest, which I can state in a note in my report.
" Feeling the responsible and delicate situation in which
" I am placed, I could not docquet the accounts, as
" approving of them, till a settlement takes place."

On the 13th May, 1828, Pringle wrote Molle: —
" I expected that you would have put me in cash for
" L.1000 by this time, in addition to the same sum I
" formerly received. I called upon you this forenoon,
" but unluckily missed you. I therefore hope, and
" request that the above sum be paid up into my hands
" some time to-morrow, the term-day being the day

" following, when you know heavy demands will be " made upon me for the interests of the estate."

On the 11th June, 1828, Brown wrote Pringle in these terms: — " I beg to mention, that my report on " Billie trust-accounts for the year 1826, is extended, " and ready to be docqueted whenever a settlement of " the factory balance is provided for. In the mean- " time, as my part of the work is done, I hope you will " have no objection to pay the fees, for which the " bearer has a receipt.

" I think it right to subjoin the copy of a letter " addressed by me to the factor, on the 26th April last, " with reference to his balance."

On the same day, Pringle again wrote Molle: — " I received a letter from Mr James Brown, the trust- " account's auditor, a copy of which I subjoin to this. " You see the accounts for the year 1826 are ready to " be docqueted whenever the balance due by you upon " these accounts is settled. This has been once and " again urged upon you, and it is absolutely and indis- " pensably necessary that it be done, and that within a " short time. In the situation in which I stand, I can- " not possibly agree to let the matter lie longer over " unsettled; it is not consistent with my duty that I " should. Not only must the balance above referred to " be settled and paid up, but I must be furnished with " a note from you of the precise sum in your hands, " in the view that this also may forthwith be made a part " of the tangible trust-funds, to be applied for the pur- " poses of the trust; and I beg leave to repeat what I " formerly stated, that neither you as factor, nor I as " cashier, ought to retain any of the trust-money in our " hands for any length of time. I must request your " particular attention to what I have stated. I do so

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

"on your own account, as well as in reference to my "official duty as a trustee."

On the 15th September following, Pringle acknowledged to Molle the receipt of L.1000, but pressed him for a farther payment before the expiration of the month, and at the same time told him, that at the next meeting of the trustees, he would insist upon immediate payment of all that was owing.

On the 5th February, 1829, Hunter wrote Molle in these terms: — "I will thank you to favour me with a "sight of those reports in the Billie trust which Mr "Brown has already completed." At this time Molle was absent in England, and the request to see the reports went off upon an answer by Molle, that on his return home he meant to have a meeting of the trustees.

A meeting was accordingly held on 4th March, 1829, and was attended by the three trustees; the entry in the minutes of the meeting upon the subject of Molle's accounts, was, — "The agents reported that the factor "and cashier's accounts up to 31st December, 1827, had "been laid before the accountant. The accounts for "1828 will also be soon made out, and laid before the "accountant."

On the 18th March, 1829, Brown wrote Pringle, — "I propose now to docquet the report on the accounts, "ending 31st December, 1826. The balance thereon "of L.1971 will be introduced into the subsequent year's "account, with interest; and a note will be inserted "in the account 1826, stating that the balance was "carried forward, and settled with interest in March, "1829, or something to this effect. I presume the "fact warrants such a statement."

About this period private communications took place between the appellant and Hunter, in regard to the

general management of the trust, and, in consequence, Hunter wrote Pringle on the 15th April, 1829, in these terms:—"I have never yet seen any of the yearly "reports of the accountant, and I certainly feel most "anxious to peruse them, to note the progress of the "trust, which I fear is extremely tardy, if not station-"ary." This letter was followed by very urgent letters to the same effect, addressed by Hunter, sometimes to Molle, and at other times to Pringle and Brown. At last, on 21st January, 1830, Brown wrote Hunter in these terms:—"With regard to the Billie trust, I "must own that I am to blame for so long keeping in "my hands the reports on the affairs. I am now using "them, and probably you will allow me to keep them "in preparing a general view of the management, for "the annual meeting of the trustees, to be held next "month, and at that time the whole may be delivered "to you. I hope that this arrangement may suit you, "as it will greatly increase the trouble of preparing the "view alluded to, if I must have recourse to the drafts "instead of the extended reports." Mr Hunter acceded to the request in this letter.

On the 10th March, 1830, Molle wrote Brown:—"I think that Mr Pringle and I had better make out "our accounts to 31st December, 1829, before you "make your report of the progress of the trust.

"I know Mr Pringle has paid from L.4000, to "L.5000, of debt during last year, and it is certainly "desirable that your report should be brought down to "as late a period as possible. I have already begun "these accounts."

On the 10th April, Pringle wrote Brown thus:—"I had prepared my accounts 1829, and yesterday put "them up with the vouchers for the purpose of their

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

"being delivered you; but I happened to see Mr Molle "early in the forenoon, who told me that he was busy "in preparing his factory accounts, also to be laid "before you, and expects to have them ready in a few "days. He therefore requested that I would not lodge "my accounts till his also were completed, so that they "might be all before you at one and the same time. "In the circumstances of the case, I thought there was "no harm in doing so. I should wish, however, that "when his accounts appear, you would drop him a note, "desiring him to hand you a precise state of the "balance in his hands, brought up to the present time, "so as you may have a complete view of matters at "making out your report upon the trust-affairs. I have "made out a note to that effect, regarding my own "transactions, and put it up alongst with the account."

On the 30th April, 1830, Molle sent Brown his accounts for the year ending 31st December preceding.

On the 1st of June, 1830, Brown wrote Molle:— "I have been expecting your answers to my notes on "your factory accounts with Billie trustees, crops 1826 "and 1827, the reports on which I cannot close without "them. I will be obliged by your supplying them "without delay, as I am very much pressed, indeed, to "furnish not only those reports, but my report on the "trust-management since its commencement. In trans- "mitting his accounts for last year, Mr Pringle has "accompanied them with a note, shewing the balance "on his intromissions to the day on which the accounts "were rendered, and he suggests that a similar note "should be supplied by you, shewing the present "balance on the factory accounts. Have the goodness "to supply this with the answers."

On the 4th June, 1830, Molle wrote Brown:—

" I send you my answers to your notes, with sundry " documents called for."

On 18th June, 1830, Brown wrote Hunter: — " I " have prepared my report on the Billie trust-accounts " for the year ending 31st December last, and will " immediately draw up the general reports, formerly " ordered, on the whole trust-management since its com- " mencement, so as the fullest information may be " before the trustees at their annual meeting, which I " understand it is proposed to hold in about a fortnight."

On the 29th July, 1830, Hunter wrote Molle: — " I am glad to learn there is now to be a meeting in " regard to these affairs, and that it is proposed to be " held in the country. It should not again be so long " postponed, nor does it appear to me that the want of " Mr Brown's report was a sufficient reason for this. " Be so good as give me a few days' notice of the period " you and Mr Pringle may fix for the meeting, that I " may be at home; and if, in the interval, you could " furnish me with a note of the different matters likely " to come before us, it would be very satisfactory."

On the 7th September, 1830, Pringle wrote Hunter: — " I lately received a letter from Mr Brown, along " with which he transmitted me one from you to me, of " date 31st ult. in which you mention that you had " completed your intended report respecting the state " of the Billie trust affairs, and brought them down to " 31st December, 1829. Mr Brown, (to whom you " sent the states,) handed me an excerpt from the " general view of matters which you have exhibited to " the trustees, and which shews the sum of debts, &c. as " at Whitsunday, 1820, soon after the commencement " of the trust, the balance of the debts and claims as at " 31st December, 1829; and after application of certain

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" funds belonging to the trustees, shewing the amount " of debt at that period, and that there has been a " decrease of debt in the intervening period betwixt " 1820 and 1829, to the extent of L.8075, odds.

" I observe that you estimate the personal funds as " applicable to the debts due, both as at Whitsunday, " 1820, and December, 1829, at so much; and, in like " manner, you take an annual sinking fund, commenc- " ing at Whitsunday, 1820, at a particular sum, and " the accumulation thereof for nine years at 4 per cent, " compound interest, at a very large sum. This may " be all perfectly proper and right, as, having not yet " seen the states themselves particularizing matters, I " cannot form any thing of a correct judgment. I " would only just beg leave to say, that I could have " wished that the details of the trust, and of what has " actually been done, of the receipts of rents, abatements " made to the tenants, arrears severally due by them, " and precise yearly payments made by the trustees, " whether of interests, annuities, or a variety of other " expenditures, had been simply pointed out; I mean a " statement of things just as they actually appear, and " what the result upon the whole in the first place; and " afterwards pointing out any plan that might appear " to be more proper for conducting the affairs of the " trust, than the mode that has hitherto been adopted. " Most likely all this and more may appear to be done " by the view of things now given. Very great pains, " I am sure, must have been taken in framing the " report, owing to its great length."

On the 21st September, 1830, a meeting of the trustees was held in the house of Hunter, to whom the accountant's reports had been previously sent, but being from home when they were sent, he had not, according

to a letter written by him at the time, had an opportunity of perusing these reports previous to the meeting.

The minutes of the meeting bore, that the factor and cashier's accounts, up to 31st December, 1829, had been audited by the accountant; and that "he had completed "his view of the progress of the trust, from its com- "mencement to 31st December last; which the meeting "desire the agents to communicate to Mr W. F. Home, "the heir of entail, for his information."

On the 27th September, 1830, Pringle wrote Hunter thus: — "Dear Sir, — I yesterday had yours of the "24th. I can assure you, that the circumstance of the "balance due by Mr Molle, the factor on the Billie "trust-estate, is fully as distressing a circumstance to "me, as it can possibly be to you. Neither that "balance, nor a former one, I mean as it stood some "time ago, and which amounted to about L.2000, I "think, escaped my observation, when directed to it. "I urged Mr Molle again and again, and pressed it "upon him, in the strongest manner, by letter, to have "it paid up. Before I say any thing farther, I may lay "before you a note of the sums I received from Mr "Molle, annis 1828, 1829, and 1830, so far as it is "come. This I do from my note-book, which I have "with me; and though I cannot positively vouch the "accuracy of it, not having my books before me, it "would appear to stand thus: —

"Sums received in 1828,	.	L.3613 14	0
"Do. Do. 1829,	. .	6706 2	0
"Do. Do. 1830, as at September,		4339 18	0

"In the payments 1829, L.1500 was paid on 13th "March, that year. I had previously stated the neces- "sity of paying up the balance of L.2000, or there- "about, in the factor's hands, and the above payment

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" was made, I believe, (though not distinctly stated to
" be so,) toward reduction of the above-mentioned
" balance. I own that I was a good deal pleased that
" this was done, from whatever quarter it was procured;
" in consequence thereof, there remained some hundred
" pounds to be accounted for; and I hoped and
" flattered myself, that this sum also would not be long
" being made furthcoming, as by far the greatest part
" of the debt had been got rid of; and that, after what
" I had said upon the subject, and expressed myself in
" no ambiguous terms, matters would thereafter go on
" in their proper channel. In this, however, I have
" been disappointed; and notwithstanding my repeated
" remonstrances to have the balance, which I vexatiously
" saw again increasing, paid up many months ago, I
" found I was quite unable to effect it, notwithstanding
" many promises that it should be so. I am most sorry
" to state, that the sums constituting the present balance
" of L.1634, due by the factor to the trust-estate, have
" been most unguardedly applied to purposes altogether
" foreign to what they should have been. Upon this
" there cannot remain a doubt. At same time, I must
" say, that I entertain as little doubt, that when Mr
" Molle did so, upon different occasions, he just took
" the readiest, whether it belonged to one or another,
" or was part of his own funds; and if it was not, he
" just satisfied himself, that out of these funds, when
" they came round, he would be able to return and
" restore what had been most inconsiderately and rashly
" misapplied. Unfortunately, however, that day has
" not yet arrived. I do not, in the smallest degree,
" justify his conduct; on the contrary, it has my most
" decided disapprobation; and I told him that nothing
" could possibly vindicate or excuse it. Unquestion-

" ably a factor has no right or title to retain any con-
" siderable sum in his hands, no more than to answer
" exigencies, say L.150, or L.200; he has a paid and
" certain stipulated allowance for his factory trouble,
" and he has nothing farther to demand. All monies,
" therefore, received by him ought to be handed over
" to the trustees' cashier, and by him applied for the
" benefit of the trust estate, in the best possible manner.
" Having got this length, I find that I must endeavour
" to contract what I have farther to say within pretty
" narrow bounds. I do not see any necessity in our
" transmitting a joint letter to Mr Molle upon the sub-
" ject before me; my idea is, that you may write him
" yourself as a trustee, and state to him, that after hear-
" ing what was expressed by me at the meeting on
" Tuesday last, and after examining the accountant's
" report, and taking into full consideration the large
" balance ascertained to be due by him, it appeared to
" be indispensably incumbent upon him, in his capacity
" of factor, to pay up that balance, with interest, since
" December, 1829; and in order to make it more easy
" and convenient for him, that you had no objection
" that he pay it by two instalments, Martinmas and
" Candlemas next; L.600 at the first of these terms,
" (as being only six weeks from this time,) and the
" remainder at the other term; and that unless this was
" done, and the first instalment made good, satisfactory
" security behoved to be required for the sum then
" falling due, and for the subsequent instalment, with
" interest till payment; and should this not be obtained,
" and as matters could not be allowed to go on longer
" in the way that they have been with regard to the
" factor's payments, some other mode must necessarily
" be adopted, to render the management more efficient,

Home and another v. Pringle and others.

22d June, 1841.

Statement.

" and the rents more regularly and punctually paid by " the factor, upon their coming into his hands. If you " incline to adopt those ideas I have thrown out, let me " know, or say what else may, in your opinion, be " thought proper to be done. I have a great personal " regard for Mr Molle; and it distresses me much to " think that the measures which I have now proposed, " or something similar, may be thought necessary; but, " in the circumstances in which I am placed, I must " put out of the question my own personal feelings and " sentiments of regard, when these interfere with, or " come into competition with, my duties in society. In " addition to what I mentioned, I would also strongly " recommend, (as I stated at the meeting,) that it be " made a point that the factor should, at the end of " every three months, render to the cashier a particular " note of the sums he has received within that period, " also of his disbursements, and forthwith pay over what " balance is in his hands, with the exception of L.150, " or so, to answer contingent demands; and that he " should lodge a note immediately of the precise sums " so received and delivered since December, 1829, when " the balance due by him was struck, and that what " sums may appear to be due in the intervening period " should be added to that balance, and included in the " first instalment to be exacted at Martinmas, or " divided betwixt it and the other; and that the after- " states should commence from the 1st of October, and " go on progressively every three months. The state " of each (year's) arrears due by each tenant should, as " you observe, be also regularly handed alongst with the " other. I intended to have despatched this on the day " of its date, but I was out of town in course of the " forenoon, and had not time to complete it in

" course of the evening. I leave this on Thursday, and " go to Knowsouth, the Sheriff's residence, where I " shall remain till Sunday, when I intend being in Jed- " burgh, and to remain there till the week following, say " 14th proximo, when I mean to make my departure " for Edinburgh. Post town for Knowsouth, 'Jed- " burgh.'

22d June, 1841.

Statement.

" P.S. — I need hardly say, that what I have stated " must be received by you in perfect secrecy, and com- " municated to no individual whatever; of course the " letter not left exposed to inspection, it being a most " vexatious and distressful matter. Of course, you will " be upon your guard not to make it to be understood " by Mr Molle that I have taken any part whatever in " what you may write. I must also beg leave to put " you in mind, that nothing be started in any other " quarter, which shall be construed as interference in " any respect in the management, except in reference to " the sale of lands, (which, I suspect, is one of the ques- " tions at present, as a partial sale would do no good.) " The trustees must stand aloof from this, and be " directed by their own judgment; and I shall ever, " while connected with the trust, protest against any " interference whatever."

On 1st October, 1830, Hunter wrote Pringle: — " Dear Sir, — I was duly favoured with your most " particular letter of the 27th ultimo. I have since " addressed a letter to Mr Molle, a double of which I " annex. He ought, beyond a doubt, immediately to " pay over the balance of L.1634 against him in " December last. The system has continued too long, " from motives of delicacy and feeling. I hold it to be " a complete breach of faith, and an evident misappli- " cation of the trust-funds, to withhold payment for

Home and another v. Pringle and others.

22d June, 1841.

Statement.

" one day; and there must be considerable funds in his " hands at the present period, independent of this " balance. However strong our regard may be for " Mr Molle, we have a duty to perform here, for the " satisfaction of conscience, and the protection of " character, as well as for those more directly inte- " rested. To propose to him to receive payment by " instalments, would be a virtual declaration of our " impression of inability on his part, which I do not " wish even to insinuate; and, moreover, a direct " charge of mal-appropriation of the trust-funds, the " bare supposition of which would never warrant us in " continuing him in that office, without security for " intromissions; as the funds belonging to the trust, in " the hands of any of the trustees, or their agents, " ought never to be diverted to any other purpose, but " should be tangible on demand. I hope he will at " once see the necessity of remitting immediate pay- " ment to you, and of furnishing a correct state of his " receipts and disbursements, to the date of our last " meeting. If, however, I do not hear within ten or " fourteen days from you, that this has been complied " with, some other plan must be adopted; while I will, " though very reluctantly, conclude that a certain un- " pleasant surmise is not altogether without the shadow " of foundation. This solely for your own eye.

" P.S. — I really do submit, that in a trust-business " such as this, the factor should be called upon to find " security for his intromissions, &c."

The letter written by Hunter to Molle, referred to in the foregoing letter, was in these terms: — " Dear " Sir, — It is with some degree of reluctance and pain- " ful feeling that I advert to the subject which last " engaged the attention of the Billie trustees at their

" recent meeting. But, after giving it every consideration, and examining the reports by the accountant, " I cannot avoid concurring with Mr Pringle in the " impropriety of so large a balance being due by the " factor, and of the necessity of its being immediately " paid over to the cashier. The case of Mr Ainslie, to " which you referred, where wealthy estates are under " his management, is totally different, and the circumstance of being charged four per cent interest, I cannot regard as any sufficient reason for so enormous a " balance being due. I am sure this must be fully " apparent to yourself. With the exception of what I " mentioned to the meeting, of the hint I got on the " subject, the two reports, or views of the accomptant, " contained the first positive intimation I had; and I " would have been pleased, when the matter was talked " of, had you readily given the cashier an order on " your account for the balance against you in December last, being L.1634. I shall be most happy to " learn that you have, ere now, done this. But I have " nevertheless deemed it my duty to apprize you of my " written sentiments, in a matter so essentially important to the trust. The other verbal recommendations " of the meeting, as to furnishing Mr Pringle with a " state of the rents realized at that date, and of those " in arrear, and to quarterly render a state of accounts " in future, you will no doubt give attention to, and " pardon my anxiety and candour; for I shall never " hesitate to express my sentiments in the trust, as I " have hitherto done, whoever may be concerned, and " however disagreeable, in some instances, this may be " to me."

On the 16th October, 1830, Pringle and Hunter wrote Molle a joint letter, in these terms:—" Dear Sir,

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

"—At the general meeting of the trustees on the Billie "estates, held at Dunse a few weeks ago, it was noticed, "amongst other things, that our auditor of accounts "had, in the state of the trust-affairs lately made up "by him, and laid before us, reported that there was "no less a balance than L.1634 due by you, as the "factor to the trust-estate, as on 31st December last, "and which has never yet been paid up. You were "some time ago apprised (and that repeatedly) of the "necessity there was that this sum should be put into "the cashier's hands for the benefit of the trust; and it "was hoped that this would have been complied with "before the meeting took place; but the urgent recom-"mendations which were given were not attended to, "and matters remain at this moment as they did in "December last. Upon the matter being stated at the "meeting, you remarked that it was a pretty general "practice for factors being permitted to retain, from "time to time, considerable sums in their hands; and "as an instance of this, you mentioned the case of Mr "Ainslie, Lord Douglas' factor, who you understood "was allowed to do so; and besides, that four per cent "interest was charged against you by the auditor, so "that, in fact, the trust-estate did not sustain any loss. "But in reference to the first of these, it may be "answered, that Lord Douglas' factor was in the use "of receiving large sums from his Lordship's estates, "which perhaps were not needed for immediate use; "that the constituent was himself the proprietor, and "was entitled to do with his own as he chose; that he "might grant this indulgence from personal favour to "the factor; besides, that there were no debts or encum-"brances to provide against. Be this, however, as it "may, the trustees are most decidedly of opinion, that

" a factor ought not to be permitted to retain sums to " any extent in his hands at any one time, but pay " them over to whoever is authorized, or has right to " receive them from him. Trustees have very serious " and solemn duties to perform, upon their acceptance " of the trust; they themselves are not the proprietors, " but hold the estates intrusted to them for behoof of " numerous and large creditors, (as is the case here,) " and also for behoof of the legitimate proprietor, whose " interest they are bound to attend to, to the best of " their power. With regard to the case of interest, " which was stated as meant to shew that no loss has " accrued to the trustees from withholding the monies, " the trustees possess no funds which can be allowed to " lie at interest, (with the exception of the bank deposits " from time to time;) and instead of any thing like a " loan bearing interest, (which the balance before men- " tioned had the appearance of, while it remains in your " hands,) it is most incumbent on the trustees to apply " whatever funds are tangible, or ought to be so, towards " the extinction of the very heavy debt affecting the " trust-estate.

" One of us (Mr Hunter) lately transmitted a letter " to the other, mentioning, that at the end of last " month, he had wrote you upon the subject of the " balance in your hands, as appearing from the report, " and of the necessity there was of this being paid up; " that it was also most necessary to render to the cashier " a state of the rents received by you since rendering " your last accounts, and not yet accounted for; and " likewise, that you should quarterly put the cashier in " possession of a state of your accounts at the time. " To the contents of this letter, he complained that he " had received no answer whatever; and, therefore, he

Home and another v. Pringle and others.

22d June, 1841.

Statement.

"urged the indispensable necessity there was of our "meeting, in order to consider as to what it would be "right and expedient to do in regard to this very vexa- "tious affair. We accordingly did agree to meet this "day for the above purpose; and after having delibe- "rately considered the state of matters, and viewed "them in all their bearings, we have come to the fol- "lowing conclusions:—1st, That you should forthwith "pay up the balance of L.1634 ascertained to be in "your hands, with interest at four per cent from "December last. 2d, That you hand over to the "cashier an exact account of your receipts and expen- "diture in relation to the trust affairs and management "since December to this date, and settle what balance "may appear to be due thereupon. 3d, That you also, "in future, render to the cashier, at the end of every "three months, a statement of accounts, shewing the "sums then in your hands, and pay over the same, with "the exception of what may be considered absolutely "necessary to be retained for periodical and occasional "advances; that statement to be accompanied also with "a correct note of what arrears may be due by the "tenants on the estates, or any of them. And lastly, "That you should find proper security for all your "intromissions during the subsistence of your factory. "The rendering a state of your accounts quarterly, "also the propriety of granting security as above, have "been before now signified by Mr Brown, the auditor, "as a proper thing which any factor should be obliged "to do.

"If there is any other satisfactory mode which you "can propose for extricating matters, and putting them "henceforth upon a more desirable footing, and which "we can consistently approve of, we will certainly pay

" that attention to it which it may deserve; but it must " be such as will be efficient, and will, with certainty, " accomplish the purpose, which, in the character of " trustees, and acting, as we are bound to do, for the " benefit and advantage of the trust-estate committed " to our charge and management, we have in view to " promote to the best of our power.

" We request your answer to this in the course of a " few days, and you will be so good as transmit a dupli- " cate of it to each of us."

On the 23d October, 1830, Pringle and Hunter complained to Molle of not having received any answer to their letter of the 16th. And on the 29th of October, Pringle wrote Hunter: — " Dear Sir, — Before I " despatched on Saturday last our joint letter to Mr " Molle, I received one from him, of date the 20th, " saying that he had received ours of the 16th, (from " Kelso;) that he proposed being in Edinburgh in a " fortnight, when he would advise with his friends on " the subject, and write me. Of this letter, he men- " tions having sent a duplicate to you. Before sealing " our letter, I addressed a postscript to him, that this " was treating the trustees in a very extraordinary " manner; that I held his letter as a mere nothing; " and that it only confirmed me more and more in " what we must now absolutely do. The eight days " which we gave for the performance of what we re- " quired of him, will expire to-morrow. I am quite " satisfied that things are now come to that point when " decisive steps must positively be taken. It has " occurred to me that one necessary mode to be " adopted is forthwith to raise an action of count and " reckoning against him, in one respect, for the pur- " pose of immediately obtaining letters of inhibition

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" upon the dependence, so as to strike against future " contractions; and concluding against him, 1st, For " the ascertained balance of L.1634; and, 2d, For " count and reckoning on account of his whole intro- " missions, and libelling for payment of a random sum " on that account, in the meantime; but more must be " done. The factory must most undoubtedly imme- " diately be recalled. There is a little difficulty in " accomplishing it, so as that it may be done as quietly " as possible, as we have so many tenants to do with. " In the view of the summons and consequent inhibi- " tion, I mentioned it to Mr George Turnbull, W.S. " who has been all along acquainted with the business, " and I find he has no objection to undertake raising " the action. It has also occurred, that if we can get " Mr Molle to resign at once, without absolutely certi- " fying him that we have absolutely recalled his powers " of factory, it would be the best and most agreeable " mode of accomplishing our object; and in that case, " he himself might notify to the tenants, or such as it " may be necessary to do so to, at the time of his having " determined to sign a resignation of his factory, and of " his having actually done so; and in that view, and in " order to expedite matters, I think it advisable that " Mr Turnbull, who has been long in habits of intimacy " with him, and formerly connected with him in busi- " ness, should go out in the Union Coach to-morrow, " call upon Mr Molle at Netherbyres, explain to " him the reason of his coming out, and endeavour to " prevail with him forthwith to subscribe a letter of " resignation, which may save a good deal of trouble. " As to the notifications which may be necessary to be " given to the several tenants, Mr Turnbull, returning " by Dunse, will inform you of the result of his applica-

" tion. Should it so happen, however, (though I hardly " think it will,) that Mr Molle refuse to comply with " what is required of him, then we must address another " joint letter to him, explicitly recalling his powers " under the factory, and declaring it at an end. And " upon the supposition that this may be necessary, I " beg leave to enclose you a letter signed by me, and " to be also signed by you, and addressed to Mr Molle, " to the above effect; and upon this, intimation must " be made to the tenants as quietly and delicately as " possible, so as to be an interdict in the meantime " against their making any payments. I have, in like " manner, enclosed an authority, under both your and " my hands, for adopting the mode which may seem " most proper and suitable for the purpose.

" I am most dreadfully teazed with this business, " what with thinking, writing, and copying, there is no " rest. Since writing the above, I have received another " letter from Mr Molle, of yesterday's date, as follows: " — 'The letter by you and Mr Hunter, dated 23d " 'inst. has distressed me much, and I would have " 'come to town immediately on receipt of it, but I had " 'made some previous engagements on business, which " 'has prevented me. I shall, however, be in town on " 'Wednesday or Thursday next, when I shall make " 'a payment, and enter on the consideration of future " 'arrangements.'

" This is perplexing in the extreme. What payment, " or to what extent he means to make the same, I know " not. Still I think it right that Mr Turnbull go out, " so as that matters may not be slackened, and he may " produce some decided favourable effect upon him; " and in place of enclosing the letter before mentioned " by us for Mr Molle, and the other, respecting the

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

"intimation to the tenants, I will deliver them to him "to be put into your hands, and after seeing Mr Turn- "bull, and hearing what may have passed betwixt him "and Mr Molle, you will be enabled to judge whether "the steps alluded to should be forthwith taken, or not; "or whether you may delay them till your coming here "and meeting with him; or whether, if Mr T. may "inform you that he is disinclined at present to resign, "you may consider it proper to despatch to him our "joint letter of revocation of the factory. It would, no "doubt, be extremely distressing to break him down, "if the interest of our trust did not positively demand "without delay, the adopting of the most compulsory "measures.

"As you are to be in town against Tuesday, I wish "you would take breakfast with me on the morning of "that day, at half-past nine or ten.

"P.S.—Upon second thoughts, I think it as well to "enclose you the letter and intimation, which you will "keep till you see Mr Turnbull, and have some con- "versation with him."

Turnbull accordingly went to Molle's house, as suggested in Pringle's letter; and on the 30th of October, he procured, and sent to Hunter, Molle's resignation of the factory in his favour.

From this time Molle ceased to have any intromission with the trust-estate, and on the 30th of November, 1830, he resigned the office of trustee. Molle's accounts were then put into the hands of Brown the accountant to be audited, and according to his report, the balance owing from Molle to the trust-estate, at the date of his renouncing the factory, on 30th October, 1830, was L.3775, 1s. 11d.

From the correspondence admitted as evidence, it

Statement.

appeared, that Hunter had throughout objected to any reduction of the rents payable from the tenants, and that in regard to this matter, if there were blame any where, none was imputable to him.

It farther appeared, in regard to the trust generally, that so early as the year 1821, and throughout the period of the correspondence which has been given, the conduct of Molle and Pringle in the management of the trust was from time to time the subject of communication between the appellant, W. F. Home, and Hunter, the latter using his character of trustee to obtain information from his co-trustees, that he might communicate it to the appellant.

On Molle's resignation of the trust, Hunter and the appellant, W. F. Home, contrived together how Pringle might be induced to take the same course. In consequence, Hunter wrote Pringle some angry letters, imputing the loss sustained through Molle to his (Pringle's) account, and threatening legal proceedings against him. The result was, that Pringle resigned the trust on the 7th January, 1831. Hunter then became sole trustee, and continued such until his death in January, 1833.

It was in these circumstances that the appellant brought his action; and in the course of it, the appellant, Mylne, was appointed judicial factor on the trust lands, and was allowed by the Court to sist himself as a pursuer of the action. Upon advising the record, the Lord Ordinary, on 17th March, 1836, pronounced the following interlocutor:[1] — "Finds, That by the settle-

[1] "*Note.*—There are various conclusions in this summons which present "no difficulty, and which, indeed, were hardly touched on in the argument "before the Lord Ordinary.

"1st, Considering the large discretionary powers conferred by the trust-"deed on the trustees, in regard to the expenses of management, the Lord

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" ments of the late George Home of Wedderburn and " Paxton, William Molle, writer to the signet, the late " William Pringle, and the late James Hunter, were " appointed trustees for carrying those settlements into

" Ordinary sees no ground for questioning the amount of the salaries allowed " to the cashier, factors, or agents; upon which it may also be remarked, that " comparing the present system of management followed by the pursuers " themselves with that under the trust, the former is considerably the more " expensive of the two.

" As to the appointment to those offices of persons holding the situation of " trustees, the Lord Ordinary has to observe, that the impropriety, inexpe- " diency, and hazard of such a course, is well exemplified in the present case. " Considering the evident consequences of such nominations, by which the " interest of the same individual, as an officer under the trust, may, and in " many cases must, be placed in opposition to his duty as trustee, much might " be said against their legality. But, taking into view the notoriety of the " practice, and the extent to which it has been carried in this country, without " any attempt at challenge, the Lord Ordinary does not consider himself " warranted in sustaining this circumstance as a substantive objection to the " trust-management.

" 2dly, In regard to the conclusion for 'malversations' committed by the " trustees, it must be at once dismissed, as the record contains no specific " statements of any malversations requiring farther inquiry.

" 3dly, The same remark applies to the general conclusion for accounting. " The whole accounts, audited by an accountant of character, are now, and " have been from the beginning, in process, and in so far as the Lord " Ordinary is aware, there is no objection to any of the articles of them, " except those connected with the balance due by the factor, Mr Molle.

" Indeed, from what took place at the debate, that appears to the Lord " Ordinary to form substantially the only ground of dispute between the " parties; and in regard to it, he has found it necessary to make a material " distinction between the case of the late Mr Hunter and that of Mr Pringle. " Against the former and his representatives, the claim seems to be ground- " less. Mr Hunter, though a trustee, took, or rather was allowed, little or " no share of the management. He was resident in Berwickshire, and acted " as the country agent of the trust. Mr Pringle and Mr Molle, the other " two trustees, resided in Edinburgh; being a quorum, they had the means " of carrying on the management, without requiring the presence of Mr " Hunter at their meetings; and the inference fairly to be drawn from the " correspondence is, that they were not disposed to admit him into the " management, farther than was absolutely necessary. Accordingly, the " Lord Ordinary is satisfied, on a perusal of the documents, that the late Mr " Hunter was, from the year 1822, entirely in the dark as to the true state " of the factor's accounts, and the continued balances allowed to remain in " his hands. It also appears, that from the 5th of February, 1829, he made " constant attempts, though unsuccessfully, to get access to those accounts, " and it was not until the end of September, 1830 that they were put into

" effect: Finds, that on the 17th of March, 1820, being " the first meeting of the said trustees after the truster's " death, William Molle was appointed factor, and the " said William Pringle cashier, each with a salary, in

" his hands. From that time he did every thing in his power to obtain pay- " ment from Mr Molle; and, indeed, it is to his exertions that the ultimate " recall of the factory may be ascribed.

" In these circumstances, considering the exuberant confidence reposed in " the trustees by the trust-deed, the reliance Mr Hunter was fairly entitled " to place in the acting quorum of the trustees, Mr Pringle and Mr Molle, " two professional persons of the first respectability, the backwardness of those " gentlemen to communicate with Mr Hunter, his ignorance of the factor's " balances, and his anxiety and activity from the moment his suspicions were " roused, and his attention called to the matter, the Lord Ordinary must " hold, that Mr Hunter and his representatives are fully entitled to the " benefit of the protecting clauses of the trust-deed; and he may farther " observe, that the charge made in this clamorous summons against the late " Mr Hunter, of entering into a corrupt compact with the late Mr Pringle, " by which he, Hunter, abandoned the action he had raised against Mr " Pringle, in consideration of Pringle resigning the trust in his favour, seems " most absurd and unwarrantable, now that it is established by the docu- " ments in process, that Mr Hunter truly acted in those matters as the " instrument of the pursuer, the heir of entail, and an instrument which, " considering the somewhat extraordinary and unscrupulous proposals made " to him in the course of those proceedings, the pursuer evidently viewed as " completely under his power. Upon all these grounds, the Lord Ordinary " has thought himself bound to award expenses to the representatives of Mr " Hunter.

" The case of Mr Pringle is very different, though, in one particular, viz. " the fairness and good faith of his actings, his character stands perfectly " unimpeached. The whole charges made against him in the summons, of " wilful violation of his duty, and corrupt connivance at the dilapidation of " the trust-funds, appear to be utterly without foundation, and might have " been spared. At the same time, the Lord Ordinary is compelled to hold, " that there was such a constructive violation or neglect of his duty, as to " render him liable for the consequences. It is true, that by the trust-deed, " the trustees are protected from any farther liability for their factor, than " that he shall 'be habit and repute responsible at the time of entering upon " office;' and it also appears, that Mr Molle was habit and repute responsible, " not only at the time of entering upon his office, but until a very short time " indeed, before the public declaration of his bankruptcy. But the present " case, like every other of the kind, must depend upon its special circum- " stances. Now here, Mr Pringle was not merely a trustee receiving the " allowance granted by the truster, he was the cashier, appointed by himself " and his co-trustees, with an additional salary. It was his duty, and he had " the power, to ascertain the state of the factor's accounts, and to restrict his " balances within a reasonable amount, whatever delay might occur in the

HOME and another v. PRINGLE and others.

22d June, 1841.

Statement.

" addition to the sum allowed to them by the trust-
" deed for 'their trouble in the management:' Finds,
" that in virtue of this appointment, Mr Molle had
" large intromissions with the rents of the trust-estate:
" Finds, that from December, 1822, large annual
" balances were due by the factor on his intromis-
" sions, and were never fully paid up: Finds, that the
" management, in terms of the above mentioned ap-
" pointments, continued until the 29th of October,

" formal auditing of those accounts by the accountant,—a delay which, in
" this case, occasionally extended to years after the accounts were given in,—
" the cashier, whose province it was to collect and apply the trust-funds to
" the proper purposes of the trust, was bound to inquire, and to know how
" the factor's account stood. It is proved by the documents in process, that
" he did know, and that the irregularity of the large balances retained by the
" factor was repeatedly noticed by the accountant. Mr Pringle's case, then,
" is not merely that of a trustee, relying on the circumstance of a factor being
" habit and repute responsible; for Mr Pringle, as trustee and cashier, had
" the means of knowing, and knew that whatever might be Mr Molle's
" general character for solvency, he was in the habitual violation of his duty
" as factor, and was either unable or unwilling to account properly for the
" trust-funds. Having this information, Mr Pringle neither required cau-
" tion, nor communicated the matter specially to his co-trustee, Mr Hunter,
" for the purpose of recalling the factory; but knowing, as he did, at the end
" of the year 1829, the large balance in the account of that year due by the
" factor, he allowed him to go on collecting the rents for the year 1830, thus
" increasing the balance to a great amount, if not to the sum actually con-
" cluded for. It is quite possible, and indeed there is no reason to doubt,
" that this conduct on the part of Mr Pringle proceeded from an ill-founded
" reliance on Mr Molle's solvency, and from a reluctance to take strong
" measures against a person with whom he was on a footing of intimacy and
" confidence. But it appears to the Lord Ordinary, that the consequences of
" this mistaken confidence must be borne by him, and not by the trust-estate,
" of which he was the guardian.

" Before concluding, the Lord Ordinary feels himself called upon to notice
" the enormous accumulation of documentary evidence with which this process
" has been encumbered. That of the pursuer extends to 300 pages of print,
" while on the part of the defenders there are about 200 more. It is true,
" that this case, turning much upon written evidence, required the printing of
" documents to a certain extent. But he must say, that this mass of pre-
" tended evidence, whether the indiscriminate admission, or confused
" arrangement of its contents be considered, has had the effect of obscuring,
" rather than of elucidating, the points in dispute, and may form a fit subject
" of consideration in discussing the point of expenses."

" 1830, when the said factory was recalled by the co-
" trustees, the late William Pringle and the late James
" Hunter: Finds, that on the following day, the bank-
" ruptcy of the said William Molle was declared, and
" that a large balance was then due by the said William
" Molle, as factor to the trust-estate, amounting, accor-
" ding to the pursuer's statement, to the sum of L.5729
" sterling: Finds, that the object of the first conclusion
" of the present summons is to fix upon the defenders,
" the representatives of the said William Pringle and
" of the said James Hunter, a liability for the said
" balance: Finds, that the said late William Pringle
" being not only a trustee, but having been appointed
" cashier, with an additional salary, undertook in that
" double character the special duty, and had the special
" means of superintending and controlling the actings
" and the accounts of the factor and co-trustee, Mr
" Molle: Finds it established by the documents in pro-
" cess, that the late William Pringle was apprised of
" the factor's irregularity in failing to pay up and
" account for the annual balances of his intromissions:
" Finds, that the said William Pringle, though thus
" aware of the factor, Mr Molle's, violation of his duty,
" took no steps, either by requiring caution, or insisting
" for payment, or recalling the factory, for securing the
" trust-estate against the consequences of the irregulari-
" ties of the factor, of which he was so cognizant: Finds,
" that in these circumstances, the late William Pringle
" did incur a liability for the loss ultimately occasioned
" to the trust-estate by the failure of the said factor,
" William Molle: Therefore, finds the defenders, the
" representatives of the said William Pringle, liable for
" the balance due by the said William Molle as factor,
" and appoints the case to be called, that this balance

22d June, 1841.

Statement.

HOME and another v. PRINGLE and others. 22d June, 1841.

Statement.

" may be precisely ascertained, but assoilzies the said " representatives from the other conclusions of the libel, " and decerns; and in regard to the defenders, the " representatives of the late James Hunter, assoilzies " them from the whole conclusions of the libel, and " decerns: Finds them entitled to their expenses, and " allows an account thereof to be given in, and to be " taxed by the auditor.

" JOHN FULLERTON."

Judgment of Court.

The appellant and Pringle's representatives reclaimed to the Inner House. The Court ordered cases for the parties, and on advising these, pronounced the following interlocutor: — " Recall that part of the interlocutor " complained of, which finds the representatives of the " late James Hunter entitled to expenses, and finds no " expenses due to either party; quoad ultra, adhere to " the interlocutor, and refuse the desire of this note."

And upon the reclaiming note for Pringle's representatives, their Lordships pronounced the following interlocutor: — " Recall the interlocutor reclaimed against, " assoilzie the complainers from the conclusions of the " libel, and decern; but find no expenses due to either " party."

Against this interlocutor the appeal was taken, and at the same time Hunter's representatives took a cross appeal against that part of it which found them not entitled to expenses.

Appellant's Argument.

The Appellant. — 1. As to the balance on Molle's accounts. The general rules of law preclude trustees from appointing one of their number to be factor under them. The trust-estate is entitled to the supervision of

the whole body; but if one be made factor, separate interests arise, and as to him, this supervision is lost. A sole trustee could not appoint himself factor, and a body of trustees cannot throw out one of their number from the trust by thus neutralizing him.

If the general principles be as stated, it is only the special terms of the deed under which the trustees act which can warrant a deviation from the rule. Here the terms of the deed preclude the notion of any intention by the truster to authorize the appointment of one of the trustees to be factor, and lead to the opposite conclusion.

With regard to any practice that may have prevailed in Scotland, or have been sanctioned by the Courts there, the law is not conclusively settled until it has the authority of this House, Montgomerie v. Wauchope, 4 Dow. 109; and if the practice be against principles, upon which all laws are founded, this House will not hesitate to correct it; Stewart v. Fullerton, 4 W. and S. 196.

Here the trustees appointed one of their own number to be factor, and with a salary; and were thus guilty, not of a moral, but of a legal fraud upon the trust, as it is viewed by Courts of Equity. Though Hunter was not present at the appointment, yet he concurred in it so far, that he never took any measures to disturb it, which he was bound to have done. Molle, therefore, was the agent of his co-trustees, and they are bound by his acts; and in this view they are liable to make good the deficiencies upon Molle's accounts; Moffat v. Robertson, 12 S. D. and B. 369; Blair v. Paterson, 14 D. B. and M. 361. It is no answer to this, that the duty of settling the accounts was devolved upon an accountant. It was never intended that the accountant was to

HOME and another v. PRINGLE and others

22d June, 1841.

Appellant's Argument.

supersede the trustees, — his duty was to adjust and settle the accounts of the trustees as a body; but their duty remained, to keep their factor close in his accounts and balances. The attention of the co-trustees was called by the accountant to the state of the balances so early as in his notes upon the accounts ending at 31st December, 1823; and though it may be that Hunter was kept ignorant, comparatively, of what was going on under the trust, and of the state of the balances, it was his duty to have made himself, and he must be taken to have been, acquainted with this, more especially as he signed the minutes of the annual meetings; Charitable Incorporation v. Sutton, 2 Atk. 406. Neither is it any answer, that both Pringle and Hunter acted in good faith. There cannot be any inquiry as to this, — the broad rule is strict observance of their duty, and their conduct, not their motives, can alone be looked at.

2. The giving of salaries to trustees in the character of officers of the trust, is contrary both to law and principle; Brocksopp v. Barnes, 5 Madd. 90; Sheriff v. Axé, 4 Russ. 33; Ayliff v. Murray, 2 Atk. 58; Robinson v. Pett, 3 P. Wms. 249. The respondents, therefore, are liable to make good to the trust the allowances to Molle as factor, and Pringle as cashier, from the commencement of the trust.

3. There ought to be a general accounting and inquiry into the whole management of the trust. This the appellant was entitled to, without the necessity of stating any objection to the accounts rendered. The delegation to the accountant by the trust-deed cannot deprive the party beneficially entitled of an inquiry, unless the deed so declares, which it does not; besides, though the accounts of the individual trustees may have been examined by the accountant, it does not appear

Appellant's Argument.

that the general accounts of the trust have been adjusted; and it cannot but strike the House, as extraordinary, that a trust-estate, having a revenue of between L.7000 and L.8000 a-year, should, in ten years, have discharged only about L.9000 of debt, out nearly of L.70,000.

[Four counsel appearing at the bar for the respondents, the Lord Chancellor intimated, that the rule of the House was to hear one counsel for each party; but if the cases of the two parties differed, the House would hear counsel on the points of difference, otherwise the rule must be observed.]

Sir W. Follett.—We will confine ourselves to the points which distinguish Hunter's case from that of Pringle.

Respondent's Argument.

The Respondent Pringle.—The question here is one purely of Scotch law, upon which English authorities cannot have any bearing. Whatever may be the rule in England, there is nothing in the law of Scotland to prevent trustees appointing one of their members to be their factor. In Wauchope v. Montgomerie's Trustees, 4 Dow. 130, Lord Eldon recognized the difference in the law of the two countries, as he did also in Stair's Trustees, 2 Wil. and Sh. 622. The appointment of one of their own number to be factor, does not alter the self-liability of the other trustees. The case, therefore, must be judged on the same principles as if a third party had been appointed.

Trustees are not liable for mere negligence, but for negligence amounting to culpa lata. This non-liability arises from the gratuitous nature of the office, and was introduced by the act 1696 in regard to curators for minors; Ersk. I. 7. 27; the same principle applies to

HOME and another v. PRINGLE and others.

22d June, 1841.

trustees. But more especially must their liability be thus limited, where, as in this case, they act under a clause of immunity; Ainslie v. Cheape, 13 S. and D. 417; Cowan v. Crawford, 13 F. C. 628.

Respondent's Argument.

At the time at which Molle was appointed factor, both his character and his credit were above suspicion. To require security from him appeared, therefore, to be superfluous, and the trust-deed did not prescribe that security should be taken from the factor. Can the omission to require this security be called crassa negligentia?

[*Lord Chancellor.* — The question is, whether the act of appointing one of their own number is not an act of intromission by the trustees, by placing in the hands of the factor, one of their own number, funds, which, otherwise, would not have been in the hands of the trustees.]

There is not any authority for saying that the mere signing of the factory would make such an act of intromission as must subject the trustees signing. In all the cases, the appointment was made without authority by the trust-deed, under which the parties were *acting*. The factor, therefore, was the mere agent of the trustees, for whose acts they were liable. But here there was a power given to appoint, and the party appointed is thus the factor of the trust. But can the appellant, Home, be allowed to challenge the appointment. He was himself present at the meeting at which it was made, and though he did not concur in the appointment at the time, because he wished the office for himself, yet he did not object to it then, nor afterwards, during the ten years which Molle held it.

If the appointment were not in itself invalid, so as to make the trustees liable for the consequences, there was

not any thing in their management of the trust otherwise that could subject them in liability. The accounts shewed, that although there were balances in each year against the factor, yet they were paid off in the course of the subsequent year. If the factor had been a third party, and solvent, like Molle, could it have been alleged against the trustees as crassa negligentia, that they had not required security for payment of these balances? The case is just one of those intended to be provided for by the clause of immunity. The cases of Syme v. Charles, and Blane v. Pattison, were both instances of gross negligence, and in the first, the appointment of factor was without any power to warrant it.

With regard to a general account, it was no part of the case in the Court below that this had not been gone into, — the only ground there taken was liability for Molle's balance.

The cross appeal, though on the subject of costs, is competent, inasmuch as the rest of the case was brought up by the original appellant. This was decided in Tod v. Tod.

Hunter's Representatives. — Hunter did not hold any office under the trust; and even as such, there were few of the meetings at which he was present, — his co-trustees had refused to allow the expense of his coming to Edinburgh, where their meetings were held, and in effect excluded him from any interference, — he was forced, therefore, to rely on the others; and if he had gone into Court to complain, he would have been remediless, as the others were a quorum, and, as such, had the full powers. In this way Hunter knew nothing of the balances until 1829, and immediately he became active and urgent in insisting upon payment.

HOME and another v. PRINGLE and others.

22d June, 1841.

22d June, 1841.

Ld. Chancellor's Speech.

LORD CHANCELLOR. — My Lords, it appears in this case, that by the first deed of the 16th of July, 1816, George Home disponed and made over his estates to, and in favour of, three trustees, David Renton, William Pringle, the respondent, and John Renton, who were to execute and manage the trust in succession, without the interference of the others; and it was provided, amongst other things, that they should have power to name and remove factors from time to time, with such powers, and liable to such diligence, as the trustee or trustees should think fit; and to pay such factors such salaries as they should see fit; and to settle accounts annually with such factors, and upon payment of what should be found due, to exonerate the factor; and within six months after each clearance with the said factors, to make up their own accounts, and to get the same approved by an accountant of character in Edinburgh; and if such accounts should be approved by the said accountant, such approbation was to operate as a full exoneration of the trustee or trustees during the currency of such account; and it was provided, that such trustees should nowise be obliged to do diligence, otherwise than as they should think fit; nor should be liable for any omissions, but only each of them for himself, and his own actual and personal intromissions; nor should they be farther liable for their factors, than that they should be "habit "and repute responsible at the time of entering upon "their office."

Amongst other trusts for the application of the income, was the payment of the yearly sum of L.100, as a gratification to the acting trustee or trustees for their trouble in the management. The trusts, it appears, only affected the rents; these were to be applied in payment of the

debts and legacies of the truster, and the interest of charges, and public burdens, and repairs, and the residue in payment of all remaining debts of the truster; and upon fulfilment of all the purposes of the trust, the trustees were to convey to the party entitled under another deed, by virtue of which the pursuer is entitled to the estate, as first heir of entail, to whom the trustees are to account for their intromissions and management.

By another deed, dated the 6th of August, 1819, George Home appointed William Molle, the respondent, William Pringle, and James Hunter, trustees, in the place of those named in the former deed, but with a declaration that the majority should be a quorum for executing the trusts, and not in other respects altering the provisions of the former deed.

Soon after the truster's death, in 1820, the three trustees met, and, Mr Home, the pursuer, being present, appointed William Molle to be factor, with a salary of L.180 per annum; and William Pringle cashier, with a salary of L.50 per annum; and on the 22d of March, 1820, a regular deed of factory was granted to Molle accordingly.

The real question in the cause, is the liability of Pringle and Hunter for the sum due from Molle as trustee, or factor, at the time of his insolvency in October, 1830; and the grounds upon which the charge is sought to be maintained, are principally, — 1st, That the appointment of one of the trustees to be factor, was of itself a breach of trust, and subjected the parties to it to all the consequences resulting from it; and 2d, That there was such gross negligence in Pringle and Hunter, in permitting Molle to keep balances in hand, as to subject them to liability for the balance due from him.

Such, at least, are the points into which the claims of

Home and another v. Pringle and others.

22d June, 1841.

Ld. Chancellor's Speech.

the pursuers are to be resolved, and which it is important to keep separate, in order to come to a right understanding of the principles of law applicable to this case, which has not, I think, been sufficiently done in some of the proceedings.

As to the first, it is said that there is a difference between the law of England and of Scotland. In England, the appointment by trustees of one of their body, to act exclusively in any part of the trust, under the authority of all, would, as to the others, have the effect of making the trustees appointing responsible for the act of the one appointed; that is, they could not treat acts done, or sums received by such appointee, in the character so conferred upon him, as the acts or receipts of a co-trustee, for which they, as co-trustees, would not be liable, but as acts and receipts of their agent, for which they would, or would not, be liable, as there might be proof of culpable neglect in their dealings with such agent. The allowance of a salary to such appointee would clearly be a breach of trust, and would therefore be disallowed.

But it is said, that the practice, if not the law of Scotland, sanctions such appointment, and the case of Montgomerie v. Wauchope, Faculty Collection, June 4, 1822, is referred to in proof of that proposition. Nothing was decided in that case upon that point, but the Judges stated, that such appointments were not inconsistent with the law of Scotland, and that a trustee, appointed by his co-trustees, was entitled to the usual remuneration of an agent or cashier. This is the real question, because it is not necessary to hold that the appointment is illegal, in order to maintain the principle, that the party who, having accepted the office of trustee, which, unless otherwise provided for by the trust, must

22d June, 1841.

Ld. Chancellor's Speech.

be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust-property, in respect of such employment. That the office of trustee, and of factor or cashier to the property, are inconsistent, cannot be disputed. If the execution of the trust require such appointments, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of the officers, and his vigilant superintendence of their proceedings when appointed, all which is lost to the trust when a trustee is appointed to the execution of those duties. Therefore the Courts of Equity in England, in such cases, refuse to the trustee any remuneration, which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointment when not actually required; and when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule, as acted upon in England, is not disputed, and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland.

In the view I take of the present case, there will not be any necessity for expressing any farther opinion upon that point. In England, the appointment of one of the trustees to act as receiver, and manage the property, and collect the rents, would not, per se, make the other trustees responsible for his acts; but it would make the trustee so appointed, the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts

HOME and another v. PRINGLE and others.

22d June, 1841.

Ld. Chancellor's Speech.

and receipts of a stranger appointed to such office, but not otherwise; and in Scotland, where such appointments are treated with more indulgence, the consequences cannot be more stringent. It appears, indeed, from the cases of Sym v. Charles, 8 Shaw and Dunlop, 741; Moffat v. Robertson, 12 Shaw and Dunlop, 369; Ainslie v. Cheape, 13 Shaw and Dunlop, 417; and Deane v. Paterson, 14 Shaw and Dunlop, 361; that the Court of Session have acted upon this principle.

The first ground, therefore, upon which the appellant seeks to fix Pringle and Hunter with the balance due from Molle, I think, wholly fails. But, secondly, considering Molle as the agent and receiver of the other trustees, have they, in their transactions with him, been guilty of such negligence as to make them responsible for the acts of their agent? For I have not been able to follow the reasoning by which it seems to have been supposed, that Mr Pringle, by accepting the office of cashier, incurred any additional responsibility as to the acts or receipts of Mr Molle. That office may indeed have afforded him opportunities of knowing the state of Mr Molle's accounts, and have given him earlier notice of his malversations; and such knowledge and notice may be important in considering his liability, but such liability must attach to his office of trustee, and not of cashier.

The question, then, is, What is the case established against Mr Pringle and Mr Hunter, of culpable negligence in dealing with their factor, Mr Molle. The trust deed directs, that the trustees should settle accounts annually with their factors, and upon payment of what should be found due, exonerate and discharge them from their intromissions and management, and within six months of each clearance with the factor, make up their

own accounts, and get them approved by an accountant. This seems to assume, that the amount so to be settled with the factor was to include the whole of his receipts and payments up to the time of the settlement; but that is not possible. It is the usual course, that such accounts should be made up to a certain time, and there must necessarily be a running account not included in any such statement. No doubt, this affords the means to a factor of keeping a balance in hand, which does not appear upon the face of his accounts. He may delay receiving a sum of money until after the time to which the account is made up, in order to keep down the apparent balance. But however dishonest such contrivances may be in the factor, they cannot impose any responsibility upon the trustees by whom he is employed, unless they are parties to, or cognizant of, them, and it is obvious, that in the management of a considerable property, it is indispensably necessary, to leave a certain balance in the hands of the manager, to meet the current expenses.

It appears, accordingly, that in Mr Molle's accounts for 1822, considerable balances were in his hands on the 31st of December of each year; but that in each of those years such balances were more than paid by the month of March or April in the following year, excepting the year 1827, in which the preceding balance was not exceeded by subsequent payments till the month of September. It is true, that in the interval he had received sums equal to, or exceeding, his subsequent payments, so that his actual balance, was not reduced; but of that the trustees had not necessarily the means of information. The balance to the 31st of December, 1829, was L.1634, which was more than covered by subsequent payments by the 7th of April, 1830.

HOME and another v. PRINGLE and others.

22d June, 1841.

Ld. Chancellor's Speech.

It appears, however, that the trustees, and particularly Mr Pringle, were aware that Molle retained balances in his hands beyond what they thought necessary or proper, and that his so doing was the subject of remonstrance in 1828, which led to the reduction of what was then due, and in 1830, the correspondence proves that Mr Pringle insisted upon the payment of the balance then in hand, which not being done, led to the recall of the factory granted to Mr Molle, which was followed by an intimation of his bankruptcy on the following day, up to which time it does not appear that there was any ground for suspecting his solvency; and it is proved, that at the time of his appointment he was in high credit. The profit which arises from the use of a balance is sufficient to account for the attempt to detain it without attributing it to inability to pay.

A passage in Mr Pringle's letter of 22d of September, 1830, has been much relied upon as shewing that he had been aware of Mr Molle's bad circumstances in 1828. He says, speaking of a payment of L.1500, received in 1828, "I own I am a good deal pleased that this was "done, from whatever quarter it was procured." The meaning of this is very doubtful; it may mean that he doubted Mr Molle's having means of his own to pay that L.1500, or it may mean that it might have been paid out of subsequent receipts, so as not in fact to reduce the amount of balance due on the preceding December. It is much too slight a piece of evidence to support the case of Mr Pringle's having at that time been so cognizant of Mr Molle's difficulties, as to have made it his duty to interpose, for the purpose of preventing his receiving any farther part of the property; and to institute legal proceedings for the purpose of compelling payment of the existing balance, the credit and

supposed responsibility of Mr Molle having been unsuspected until very shortly before his bankruptcy. I cannot, therefore, find, in the evidence given, any such proof of culpable negligence in the mode of dealing with the factor, as would, according to the decisions in Scotland, render a trustee liable for the losses sustained by his ultimate insolvency. The cases of Ainslie v. Cheape, 13 Shaw, 417; and Cowan v. Crawford, in 13 Faculty Collection, 628, are strong authorities upon this point.

In 1828, the trustees, finding their factor retaining balances in hand beyond what they thought proper, press him by every means short of legal proceedings to keep down such balances, which course continues till December, 1830, when, finding their efforts ineffectual, they recall his appointment, which produces his bankruptcy, without any previous proof of his being insolvent.

The result is, that in my opinion the judgment below was correct in holding, that Mr Pringle's estate is not liable for the loss sustained by the insolvency of Mr Molle; and if he did not make himself liable for such loss, it is clear that Mr Hunter did not, for every circumstance from which the responsibility of Mr Pringle could arise, exists in a less degree in the case of Mr Hunter.

If the case fails so far, there is, I think, no ground for the general account, for if Messrs Pringle and Hunter are not chargeable with Mr Molle's balance, their own accounts have been regularly examined and settled according to the provisions of the trust-deed, and no case is made for opening them.

It is indeed said, that Mr Pringle has in those accounts been allowed a salary of L.50 per annum, to which, as trustee, he was not entitled; and if that question had

HOME and another v. PRINGLE and others.

22d June, 1841.

Ld. Chancellor's Speech.

arisen for decision in a proper form, and under circumstances calling for a judgment upon the point, whether a trustee could create an office for himself out of his trust, so as to derive profits from his trust, I should have had great difficulty in assenting to what appears to have been assumed, rather than decided, in Scotland. In such a case, there cannot be any good reason for any difference in the rules adopted in the two countries, and there cannot be any doubt as to the inconvenience and danger of such a practice; but in this case, if the L.50 per annum were to be disallowed, and struck out of Mr Pringle's accounts, he would be entitled to charge for all actual expenses incurred by the duty he performed as cashier. So that there is no probability that the estate would profit by opening the accounts in this respect. And when it is considered that this allowance arose from an appointment made in the presence of the pursuer, and was to be paid out of rents, the surplus of which was his, and that it has been sanctioned by the accountant, who had authority from the trustees to settle the trustees' accounts, I cannot think that it would be advisable for such a purpose to interfere with the judgment below, particularly when it appears that such allowances have been usual in Scotland, and that there is something like judicial authority for them, as in Montgomerie v. Wauchope, Faculty Collection, 4th June, 1822.

I think also, that the House would be very reluctant, when the principal object of the suit fails, to give any relief upon so small a part of the case, particularly where the record is loaded with charges and accusations of personal fraud and wilful dereliction of duty, against Mr Pringle and Mr Hunter, of which there is not only no proof, but for which there does not appear at any time

to have been any reasonable ground for suspicion, and for introducing which into the pleadings I have not seen or heard any justification.

22d June, 1841.

Ld. Chancellor's Speech.

This leads to the only remaining question, that of costs, the only one upon which I entertained any doubt; and if I had been sitting in the Court below, considering the failure of the case made against the trustees, and the unjustifiable charges brought against them, I should perhaps have thought it just that they should be indemnified in costs, by directing the pursuers to pay them. But in this house the case is different. A court of appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone, and the question of costs can only arise upon the cross-appeal. I am therefore of opinion, that both appeals should be dismissed with costs.

Judgment.

Ordered and Adjudged, That the original appeal be dismissed this House, and that the interlocutor of the Lord Ordinary, of the 17th of March, 1836, in so far as not recalled by the two interlocutors of the Lords of Session of the First Division, of the 30th of November, (signed 1st of December,) 1837, or either of them, be affirmed; and that the two interlocutors of the 30th of November, 1837, be also affirmed, with costs: And it is farther ordered and adjudged, That the said two cross appeals be dismissed this House, and that the two interlocutors of the 30th of November, 1837, so far as therein respectively complained, be affirmed with costs.

SPOTTISWOODE and ROBERTSON — GEORGE WEBSTER — RICHARDSON and CONNELL, Agents.

[Heard, *June* 15, 1841.—Judgment, *June* 22, 1841.]

(No. 16.) JAMES FOGO, Esq. Captain in the Royal Artillery, Appellant.

[*Lord Advocate — Kindersley.*]

DAVID MATHIE, calling himself DAVID FOGO of Row, Respondent.

[*Attorney General — Anderson.*]

2d DIVISION.

Lord Ordinary Moncreiff.

Statement.

THE judgment of the Court below in this cause is reported in 2 D. B. and M. 651.

As the judgment upon appeal does not express any opinion upon the questions appealed, farther than a desire to have them re-argued before the whole Judges of the Court below, it would be uselessly loading these pages, to do more than give the judgment of the House.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case was heard in the presence of my noble and learned friend, who is not now able to attend, being engaged in judicial business at the Privy Council; but I have communicated with him upon the subject of this case, and in the result we fully agree as to the course which it is expedient for your Lordships to take.

I abstain from entering at any length into the merits of the case, because it is our opinion, that, considering the nature of the question, that it is exclusively a question connected with the law of real property in Scotland, and that it is a question affecting the general rules and practice of conveyancing in Scotland, it would be expe-

dient for your Lordships to have farther information before you come to any final adjudication.

My Lords, one question is, Whether a conditional institute, becoming entitled by the death of the parties entitled before her, and therefore entitled to take up the entail, but entitled only upon proof of the predecease of the persons who claimed before her in the order of succession, has such a personal title to the property, as to enable her, without taking the usual steps to make up a feudal title, to execute a deed of entail. That is a question, with reference to which I shall shortly refer your Lordships to the proceedings in the Court below, for the purpose of shewing that it is one on which considerable doubt must necessarily prevail.

My Lords, there is another question in this case, independent of that first, namely, Whether Isobel Russell, under whom the party claimed, had or had not made out her feudal title. That point was never considered in the Court below, they having decided the case upon the first point, and therefore it became unnecessary for them to exercise any judgment upon the second.

Now, upon the first point, namely, the personal right of Isobel Russell to execute the deed of entail, being the person undoubtedly entitled, but assuming that she had done nothing to obtain feudal investiture, we find the Lord Ordinary deciding in favour of the title of the defender, and therefore assuming that she had a right to execute this deed of entail. The Lord Ordinary gives reasons for the conclusion to which he comes. But when the case came before the Inner House, they came to the same result and the same conclusions that the Lord Ordinary had come to, but entirely displaced all the reasonings upon which he had proceeded. It

Fogo v. Mathie. 22d June, 1841. Ld. Chancellor's Speech.

appears, that they "recall the several findings of the "Lord Ordinary's interlocutor reclaimed against, and "find, that the personal right under the deed of settle- "ment executed by Mrs Elizabeth Fogo in 1769, vested "in Isobel Russell, the entailer, as disponee and insti- "tute under that deed, in consequence of James Russell "and Agnes Russell having predeceased the said Eliza- "beth Fogo: Farther, find, that, in virtue of the per- "sonal right so vested in her, the said Isobel Russell "had full power and capacity to execute the deed of "entail now under reduction." So far, therefore, we have the opinion of the Lord Ordinary, founded upon certain conclusions of law, from which the Inner House entirely dissent. Not only they do not act upon them, but they expressly recall the findings upon which he proceeded. That of itself would create very considerable doubts as to the course which your Lordships ought to adopt.

But the case does not rest there; because your Lordships find a case decided, Peacock v. Glen, which we have not been able to reconcile with the conclusion to which the Court of Session have come, it appearing, from the report of that case, that in a contest with a party claiming the benefit of an heritable bond, the judgment was against his title, because the party who had executed that bond had not made up his titles to the estate, although he had a clear personal right to the estate. Therefore your Lordships, upon a question of pure Scotch conveyancing, have a case directly opposed to the present; and your Lordships, in the present, have the Lord Ordinary and the Inner House coming to the same conclusion, but the Inner House rejecting the grounds upon which the Lord Ordinary had come to that conclusion.

This is a question certainly very much of juris positivæ, and there is very little analogy to be drawn from the laws of other countries. But it is most essential that the rules of conveyancing should be distinctly understood, that titles to real property in Scotland may not be endangered by the parties employed in conveyancing and in making up titles to estates not having accurately the principles by which they are to be governed. In a question of this sort, this House is very reluctant to interfere, and your Lordships are very much in the habit, where there appears to be no difference of opinion among the Judges, or the authorities in Scotland, whatever your Lordships' own opinion may be as to the propriety of the rule, of adhering to the opinions at which they have arrived, derived from the practice and experience of those who are conversant with that branch of the law of Scotland. But unfortunately, in this case, your Lordships have not the means of ascertaining, from the decision to which I have referred, what has been the practice, or what are the principles upon which, in the opinion of the Court of Session, questions of this sort ought to be decided. There are contradictory decisions, and there appears to be a difficulty on the part of the learned Judges, in laying down and describing plainly to the public and to the profession, what those rules and principles are.

Under these circumstances, it appears to us, that it would not be safe for this House to proceed to an adjudication, either in favour of the one side or the other, without having the benefit of the opinion of all the learned Judges, as to what the rule is, as founded upon principle and practice, and what it ought to be for the future. I shall move your Lordships, therefore, upon this occasion, to remit the cause, for the purpose of its

Fogo v. Mathie. 22d June, 1841. Ld. Chancellor's Speech.

being argued before all the Judges of the Court of Session, and your Lordships will then be enabled to come to a more satisfactory conclusion than you can do under the present circumstances of the case.

My Lords, there is another point to which I have alluded, which we are anxious also should be brought under the consideration of the learned Judges, namely, as to the state of the feudal title; because, although when this case comes back, we may be in a situation to decide upon it, without reference to that point, yet if there should unfortunately be a difference of opinion among the Judges as to the question of the personal right, then we should be in the situation of not having the opinion of the Court below as to the second point in the case, namely, as to the state of the feudal title, and that might occasion another remit, which would be a great hardship upon the parties, and lead to considerable delay and considerable expense. We are therefore anxious that that point should be made a subject of consideration in the Court below, in order that when the case comes back to this House, we may have materials to enable this House to come to a final decision. It is very true, there was nothing in the case, as it came on before, to require the Court below to decide upon the question of the feudal title, in consequence of the decision to which they came upon the first point. But the case must be contemplated of this House not concurring in the opinion which has been formed, and which may be formed again, upon the first point, in which case it would be necessary to enter into an investigation of the second. We shall therefore be anxious not only to have the opinion of all the learned Judges upon the first point, namely, as to the personal right, but also as to the feudal title, which may, when this case comes

back again, enable your Lordships to adjudicate finally between the parties. Foco v. Mathie.

Mr Anderson. — Will your Lordships allow me to mention the matter of costs? Your Lordships will reserve the question of costs till the case comes back? 22d June, 1841. Ld. Chancellor's Speech.

Lord Chancellor. — Of course the costs are reserved.

Ordered and Adjudged, That the cause be remitted back to the First Division of the Court of Session in Scotland, with direction that the same be argued before the whole judges of the Court of Session, (including the Lords Ordinary,) who shall consider not only the personal right of Isobel Russell to the lands of Row mentioned in the appeal, but also the state of her feudal title thereto, and shall deliver their opinions thereupon respectively. And this House does not think fit to pronounce any judgment upon the said appeal, until the whole of the said judges shall have given their opinions upon the matters hereby referred to their consideration under this order. And it is farther ordered, that all questions as to the costs of this appeal be reserved. Judgment.

Gilbert Bolden — Graham, Moncrieff, and Weems, Agents.

[Heard, *May* 21, 1840. — Judgment, *Sept.* 23, 1841.]

(No. 17.) SIR JAMES GIBSON CRAIG, Bart., Appellant.

[*Lord Advocate.*]

SIR THOMAS JOHN INGLIS COCHRANE, Knight, Respondent.

[*Follett — Walker.*]

Service of Heirs. — Proceedings in a service held to shew that it was expede by the party, as an heir of entail, and not of line merely.

Superior and Vassal. — *Titles.* — The title of a vassal made up by entry with the party, appearing by his infeftment upon the record to be the superior, will not be affected by any defect in the title of such superior, as in a question between the vassal and other parties claiming the dominium utile, as never having been vested in the vassal, in respect of such defect in the superior's title, — more especially if the vassal have charged all parties to enter as superior, and none appeared to challenge the entry of the party with whom he entered.

Fiar and Liferenter. — *Superior and Vassal.* — A superior uninfeft may competently dispone the superiority in liferent, with power to the disponee to enter vassals, and an entry by the liferenter, given in exercise of the power, will be valid and effectual.

Titles — *Accretion.* — Decree at the instance of a superior reducing an infeftment taken upon a precept in a crown charter, as in contravention of an entail, and declaring the infeftment of the party pursuer, taken upon the same precept, as the only good title, will draw back to validate a precept of clare constat, previously given by the pursuer, and the vassal's infeftment upon it.

1st Division.

Craig
v.
Cochrane.

23d Sept. 1831.

Statement.

THIS was a competition of titles in regard to the lands of Murdieston, between the appellant, as adjudging creditor of Dr Ramsay, heir general and of line to Alexander Inglis, the maker of an entail in 1719, and the respondent, as heir of entail under a deed executed in 1802, by one of the substitutes under the entail of 1719.

Alexander Inglis, the original entailer, was proprietor in fee-simple of the lands of Murdieston, which were held by him in feu of the Duke of Hamilton. On the 12th February, 1719, Inglis executed an entail of the lands in favour of his nephew, Alexander Hamilton, and the heirs-male of his body, and a series of substitutes; and failing them, his nearest and lawful heirs and assignees whomsoever,—the eldest heir-female succeeding without division. This entail did not contain any prohibition against altering the order of succession. One of its conditions was, that the heirs should assume the name of Inglis.

On 9th May, 1719, Alexander Hamilton Inglis, the institute, took up the estate by infeftment upon the precept in the deed of entail, and by charter of adjudication in implement from the superior, the Duke of Hamilton. After this, Alexander Hamilton Inglis died, leaving four sons, Alexander, Gavin, James, and Walter.

On the 4th May, 1772, Alexander, (second,) was infeft in the entailed lands upon a precept of clare constat from Douglas, Duke of Hamilton.

On 6th August, 1772, Douglas, Duke of Hamilton, with the view of taking advantage of the 20 Geo. II. cap. 50, empowering heirs of entail to sell the superiorities of their lands to their own vassals, granted a procuratory of resignation in favour of himself, and there-

CRAIG v. COCHRANE. 23d Sept. 1841.

Statement.

upon expede a charter of resignation under the great seal, of the lands held by him, including Murdieston, in favour of himself and the heirs in the entail of the dukedom, under the fetters of that entail.

On 21st September, 1772, the commissioners of Duke Douglas disponed the superiority of Murdieston to the vassal, Alexander, (second,) his heirs and assignees, and assigned to them the procuratory, as yet unexecuted, in his grace's crown charter.

On 24th September, 1772, Alexander, (second,) while yet uninfeft upon the Duke's disposition, conveyed the superiority of one half of Murdieston to his brother, James, in liferent, and to the Duke of Hamilton in fee, "with full power to the said James Hamilton, during "his life, to enter and receive all vassals in the said "lands, and receive the composition due by law there-"for, fully and freely in all respects, without the con-"sent of the said Duke and his said foresaids, the fiar "of the said lands." This conveyance assigned the crown charter of 6th August, 1772, and the precept therein.

On the same day, 24th September, 1772, Alexander, (second,) disponed the superiority of the other half of Murdieston to his brother, Walter, in liferent, and the Duke in fee, with the same power as in the other conveyance to James and the Duke. James and Walter were both infeft upon the precept in the crown charter of 6th August, 1772, by virtue of the assignations of that charter in their respective dispositions,—the instruments of sasine merely noticing the above power in setting out the disposition in which it was contained.

On the death of Alexander, (second,) without issue, his immediate younger brother, Gavin, obtained a precept of clare constat from his brother James, the liferent

superior of one half of Murdieston, and from Douglas, Duke of Hamilton, the superior in fee of the other half, — Walter Inglis, the liferent superior of this half, being dead at this time,—and took infeftment upon this precept.

On the death of Douglas, Duke of Hamilton, his successor, Duke Archibald, made up his titles by general service to Duke Douglas in March, 1801, and by infeftment upon the precept in the charter of 6th August, 1772, as if still unexecuted. This infeftment was taken on 23d March 1801.

On the 14th March, 1802, Gavin Inglis having died without issue, his brother, James, who had resumed his original family name of Hamilton in conjunction with that of Inglis, "as immediate lawful superior in the "liferent of the lands and others after mentioned, with "power to enter and receive all vassals in the said "lands, and receive the composition due therefor, con- "form to disposition and assignation in favours of me "in liferent, and to the deceased Douglas, Duke of "Hamilton and Brandon, his heirs or assignees, in "fee, granted by the also deceased Alexander Inglis, "formerly of Murdieston, dated the 24th day of Sep- "tember, 1772 years, and our infeftment following "thereon, dated said 24th of September," granted a precept of clare in favour of himself, as immediate younger brother to Gavin Inglis, "and nearest and "lawful heir of tailzie to him in the said lands and "others foresaid," for infefting himself in that half of the lands of Murdieston of which he was liferent superior; "but allwise with and under the provisions, clauses "irritant and resolutive" in the entail of 12th February, 1719, which were especially set forth. Under this precept he was duly infeft on 14th June, 1802.

CRAIG v. COCHRANE. 23d Sept. 1841.

Statement.

On the 15th June, 1802, James Inglis Hamilton, as heritable proprietor of that part of the lands in which he had been infeft, and as heir-apparent to Gavin as to the other part, executed a new entail of the lands in favour of his own natural son, James Hamilton, and the heirs-male or female of his body; whom failing, to the respondent's father, Sir Alexander Inglis Cochrane, and the heirs-male of his body, and a series of substitutes, thereby altering the destination from that contained in the original entail of 12th February, 1719. By this deed the granter bound himself to procure himself infeft in that part of the lands which he held only in apparency, and thereafter to infeft the disponees. The warrandice in this deed was personal from fact and deed only.

With the view of completing his title according to the above obligation, James procured a brieve for serving him heir "in special and of line" to his brother Gavin, which was duly retoured on 7th September, 1802, — the retour bearing, that Gavin Inglis died last vest in the lands, — "Sed cum et sub provisionibus, "declarationibus, clausulis irritantibus et resolutivis, "inibi contentis, et in dispositione et Tallia per demor- "tuum Alexandrum Inglis de Murdiston, in favorem "etiam defuncti Alexandri Inglis alias Hamilton, ejus "patris, et aliorum hæredum inibi mentionat. de data "duodecimo die mensis Februarij, anno domini mille- "simo septingentesimo et decimo nono et in cartis et "Infeofamentis desuper sequen. et non aliter, viz." &c. "Et quod dictus Jacobus Inglis Hamilton est imme- "diate junior frater germanus dicti Gavini Inglis "Hamilton defuncti, et propinquior et legitimus hæres "Talliæ illi in terris et alijs suprascript."

James Inglis then, in ignorance that Duke Archibald had been already infeft in the superiority, raised and

executed letters of horning against Lord Stanley, the heir of line of Duke Douglas, the commissioners of Duke Douglas, and Duke Archibald, setting forth, that he had been served "heir in special and of line" to his brother, Gavin, in the lands of Murdieston, and charging them to procure themselves infeft, and thereafter to grant precept for infefting him.

Duke Archibald made up his titles as heir-male and of tailzie to Duke Douglas, and on 27th November, 1802, granted a precept of clare constat for infefting James Inglis Hamilton, which bore, that "Gavin Inglis "Hamilton, Esquire, last of Murdieston, brother of "my lovite, General James Inglis Hamilton, now of "Murdieston, bearer hereof, died last vest and seased," &c.; "but with and under the provisions, declarations, "clauses irritant and resolutive after-mentioned, and "contained in a disposition and tailzie of the five-pound "land of Murdieston, comprehending the lands afore-"said, by the deceased Alexander Inglis of Murdieston, "in favours of the also now deceased Alexander Inglis, "alias Hamilton, and the other heirs therein mentioned, "dated the 12th day of February, 1719, and no other-"ways, viz." (Here followed the conditions of the entail.) "And that the said James Inglis Hamilton, "bearer hereof, is the immediate younger brother of "the said deceased Gavin Inglis Hamilton, and nearest "lawful heir to him in the foresaid lands, conform to "his special service," &c., and directed infefment to be given to James Inglis Hamilton "as heir aforesaid."

James Inglis Hamilton expede infeftment upon this precept. The instrument of sasine bore date the 29th November, 1802, and was duly recorded in the particular register of sasines; but the certificate of registration on the instrument bore to be dated in the year "seven-

CRAIG v. COCHRANE. 28d Sept. 1841. Statement.

teen hundred and eighty-two." The instrument was, however, docqueted thus, in the handwriting of the person by whom the body of it had been written:—

"Dated 29th Nov. } 1802."
"Regist. 2d Dec. }

And the minute-book of the keeper of the register and the record itself, both bore entries of the sasine, of the date 2d December, 1802.

In 1803, James Inglis Hamilton, the maker of the new entail of 15th June, 1802, died, and was succeeded by his son, James Hamilton, who made up titles under that entail, by taking infeftment upon the precept in the deed. James Hamilton died in 1815, without issue, and was succeeded by Sir Alexander Inglis Cochrane, the next substitute, who, on 10th November, 1815, made up his title by service, as heir of tailzie to James Hamilton, and charter and confirmation of James's infeftment, and precept of clare constat from Archibald, Duke of Hamilton, and by infeftment upon this precept.

In February, 1832, Sir Alexander Inglis Cochrane died, and was succeeded by his eldest son, the respondent, who made up his title, by precept of clare constat, as heir-male and of tailzie to his father, and by infeftment thereupon.

The title to the superiority of the lands stood thus:

In 1796, Douglas, Duke of Hamilton, had conveyed the whole real estate of which he should die possessed in favour of certain trustees, for behoof of Mrs Westenra and Mrs Esten. On his grace's death, the trustees divested themselves by conveyance to these ladies; and thereafter Mrs Westenra and Mrs Esten entered into a contract with Sir A. Inglis Cochrane for a sale to him of the superiority of Murdieston, as comprehended under Duke Douglas's conveyance to the trustees.

In 1801, Archibald, Duke of Hamilton, as formerly mentioned, made up his titles under the entail of the dukedom. This he did by serving himself heir-male of tailzie and provision in general to Duke Douglas, and by taking infeftment upon the crown charter to Duke Douglas, dated 6th August, 1772, as if that precept had been still unexecuted.

Duke Archibald then brought an action against the trustees under Duke Douglas's conveyance in 1796, Mrs Westenra, Mrs Esten, Lord Stanley, as the heir of line of Duke Douglas, and Sir Alexander I. Cochrane, concluding for reduction of Duke Douglas's disposition to Alexander Inglis, of 21st September, 1772, of Alexander Inglis's dispositions to James and Walter Hamilton, of 24th September, 1772, respectively, and the infeftments which followed thereupon, and of Duke Douglas's trust-disposition of 1796, and the conveyance by the trustees, and the contract between Mrs Westenra and Mrs Esten, upon the ground, that the charter of resignation expede by Duke Douglas, and the conveyance by him to Alexander Inglis, were not in conformity to the provisions of the statute under which they professed to be executed.

In May, 1817, the Lord Ordinary repelled the defence of prescription founded on the infeftment of 24th September, 1772, in favour of the late Duke of Hamilton, sustained the reasons of reduction, "and reduced, "retreated, rescinded, cassed, and annulled, and here- "by reduces, retreats, rescinds, casses, and annulls "the foresaid disposition made and executed by "the said Duke and his commissioners, particularly "before narrated, with the whole conveyances thereof, "and instruments of sasine, and other deeds that have "since followed thereon, the foresaid trust-disposition,

CRAIG v. COCHRANE. 23d Sept. 1841. Statement.

" in so far as concerns the said lands, and the said contract entered into, and disposition granted or to be granted in favour of the said Sir Alexander Forrester Cochrane, and any charters or infeftments to follow thereupon, and decerned and declared, and hereby decern and declare, the same to have been from the beginning, and to be now, and in all time coming, void and null, of no avail, force, strength, or effect in judgment or outwith; that although the aforesaid disposition appears to have been granted under the foresaid Act of Parliament, yet the foresaid Alexander Inglis, the vassal, having executed dispositions of the superiorities so conveyed to him, in favour of the persons above narrated, in liferent, and to the said Duke, and his heirs and assignees whatsoever, in fee, the simulate and collusive nature of the transactions above libelled is from thence apparent; and the said dispositions and infeftments taken in favour of the said Duke, and his heirs and assignees, in fee, can transfer no real right or interest in the foresaid lands and superiorities to his said trustees and heirs whatsoever, or those deriving right from them, but the said infeftments must be held to have been taken in favour of the said Duke and his heirs of entail, in respect they proceeded upon the foresaid disposition by him to his vassal, and reconveyance by him to his grace, and assigned to him the unexecuted precept of sasine contained in the foresaid charter of resignation under the great seal, of the estate and dukedom of Hamilton, comprehending the lands and others above described, in favour of his grace, and the heirs-male of his body, whom failing, the other heirs of tailzie specified and contained in the foresaid deed of entail made and executed by the said William and Anne, Duke and

" Duchess of Hamilton, but always with and under the " conditions, provisions, restrictions, reservations, clauses " irritant and resolutive, contained in the said deed of " tailzie, and in the foresaid charter itself, in favour of " the said Duke; and found and declared, and hereby " find and declare, that the pursuer has now the only " good and undoubted right and title to the estate and " dukedom of Hamilton, comprehending therein, among " others, the lands and superiorities before narrated, " notwithstanding the said nominal and fictitious aliena- " tions thereof, and to uplift the rents, maills, feu-duties, " and casualties of superiority due by the vassals in " the said lands from and since the term of Whitsunday, " 1799, when his entry to the said estate commenced, " upon the death of the said Douglas, Duke of Hamilton " and Brandon, his predecessor, and that none of the " said defenders ever had any right or title to any part " of the said rents and duties, and that the titles before " narrated of the said pursuer, viz. the said charter of " resignation of the said lands and dukedom, in favour " of the said Douglas, Duke of Hamilton and Brandon, " and his heirs of entail, dated the 6th day of August, " 1772, with the retour of the pursuer's general service " as heir-male and of tailzie to him, dated the 11th of " March, 1801, and the instrument of sasine following " upon the precept contained in the said charter, and " on the said retour in the pursuer's favour, dated the " 23d day of March, and registered the 14th day of " April, 1801, form and constitute the only good right " and title to the said lands and dukedom, comprehend- " ing the whole lands and superiorities above narrated, " notwithstanding the fraudulent and fictitious aliena- " tions thereof before specified."

Successive representations by Sir Alexander Cochran

CRAIG v. COCHRANE. 23d Sept. 1841. Statement.

among others were presented against this interlocutor, and refused. Ultimately a petition to the Inner House was presented, to which answers were boxed on the 10th September, 1818, in the name of the pursuer, Duke Archibald.

On the 16th February, 1819, Duke Archibald died, and was succeeded by Duke Alexander.

On 9th June, 1819, the defenders, Sir Alexander Cochrane and Miss Hamilton, gave in a note in the following terms: — "The defenders have now resolved "to acquiesce in Lord Pitmilly's interlocutor, and to "withdraw from farther litigation upon the question. "This they feel it their duty to state to your Lordships, "to prevent the Court having the trouble of perusing "the petition and answers, and that your Lordships "may strike the case from the roll, as it stands for "advising upon Tuesday, the 15th of June current."

On the 10th of June, 1819, the Court appointed the cause to be struck out of the roll, as prayed for. On the 11th, the cause was put to the roll, when, as alleged by the respondents, a minute was put in, stating, "that "since the cause had come into Court, and the answers "had been boxed, his grace the late Archibald, Duke "of Hamilton and Brandon, had died," and craving leave to sist his grace Alexander, now Duke of Hamilton and Brandon, his eldest son, as the party pursuer, in place of his father, deceased, and that the action might proceed, and decree be pronounced in his name.

On 11th June, 1819, "the Lords having advised this "petition, additional petition, answers thereto, and a "note for the petitioners, of consent adhered to the "interlocutor complained of, and refused the desire of "both petitions."

This decreet was extracted, and a regular extract

produced in this process, which bore, — "In the course "of which action the pursuer, Archibald, Duke of "Hamilton and Brandon, having died, his grace Alex- "ander, now Duke of Hamilton and Brandon, sisted "himself as pursuer of said action, conform to minute "in process."

The appellant in the present case, however, alleged, that Duke Alexander was not served heir to Duke Archibald until 14th February, 1820; that the minute stated by the respondents to have been lodged on the 11th June, 1819, was indorsed as of the year 1820; that the decree was extracted in January, 1820; and that the extract shewed on its face, and various parts, that it was originally an extract of a decree in favour of Duke Archibald, and had been altered so as to make it a decree in favour of Duke Alexander.

With the view of obviating any objection to the decree on these grounds, Duke Alexander brought an action, concluding for reduction of the decree and extract, to the effect of enabling him to waken and revive the original action, and bring the same to a conclusion, and to obtain decreet therein anew.

In this action, the Court, on 10th July, 1835, "wakened and transferred in terms of the conclusions "of the libel, conjoined the action with the original "action of reduction, and of new having advised the "petition and additional petition given in in said ori- "ginal action, with the answers thereto, and note for "the defenders, adhered to the interlocutor complained "of in the said petitions, and refused the desire thereof." Thus stood the title to the superiority of the lands.

In January, 1819, Dr Ramsay, as heir of line of the original entailer of the lands of Murdieston, commenced a series of attempts to disturb the title of Sir

CRAIG v. COCHRANE. 23d Sept. 1841.

Statement.

Alexander Cochrane, the heir in possession under the new destination of 1802, in all of which he was unsuccessful.

Finally, on the 22d May, 1833, he procured himself to be served heir general and of line to Alexander Inglis, the maker of the entail of 12th February, 1719. In that character, the appellant, Sir James Gibson Craig, adjudged from him the lands of Murdieston, upon a trust bond, and then brought the action which was the subject of this appeal, concluding for reduction, 1st, Of the precept of clare by James Inglis Hamilton, of 14th March, 1802, and sasine following thereon. 2d, The retour of James Inglis Hamilton's service of 7th September, 1802, and the brieve whereon it proceeded. 3d, The precept of clare constat by Duke Archibald, in favour of James Inglis Hamilton, of 27th November, 1802, and sasine following thereon. 4th, The deed of entail executed by James Inglis Hamilton on 15th June, 1802, and sasine following thereon. 5th, The retour of Sir A. Cochrane's service of 10th November, 1815. 6th, A charter of confirmation and precept of clare constat by Duke Alexander in favour of Alexander Cochrane, of 21st July, 1820, and sasine following thereon. And 7th, A precept of clare constat by Duke Alexander, on 27th February, 1832, in favour of the respondent, and sasine following thereon; and to have it declared, that the titles called for did not constitute any valid title to the lands of Murdieston; and that the right to the same was still in hæreditate jacente of Gavin Inglis Hamilton; and that the appellant, in virtue of his decree of adjudication, had the only right to the lands.

After hearing parties upon the summons and defences, and condescendence and answers, the Lord Ordinary ordered cases to be boxed to the Inner House; and the

Court, after a hearing in presence on the 10th July, 1838, pronounced an interlocutor, assoilzieing the defenders. Against this interlocutor the appeal was taken.

CRAIG v. COCHRANE.

23d Sept. 1841.

The Appellant. — I. In regard to that portion of the lands of Murdieston, the superiority of which was conveyed by Alexander Inglis to James Inglis Hamilton in liferent, and Duke Douglas in fee.

Appellant's Argument.

1. The title made up by James Inglis Hamilton upon his own precept of clare constat was void, because he was merely a liferenter by constitution, who, as such, has not power to enter vassals. The power to this effect given to him by the conveyance of Alexander Inglis's disposition and assignation of 24th September, 1772, was a mere nullity, and could not confer any right which a liferenter could not by law enjoy. Alexander Inglis was not infeft in the superiority, he had a mere personal right; he could not therefore himself have entered vassals, and still less could he confer power upon another to do it. Ersk. II. 9, 42; Mack. II. 9, 38. But even if Alexander Inglis had been infeft, a superior cannot separate the power of entering vassals from the dominium directum, which would be the necessary effect, if such a power, given to a liferenter, were to receive support, as a liferenter, unless by reservation, has not any estate in the dominium, but possesses a mere burden upon it, for the enjoyment of the yearly fruits. Stair, II. 6, 1; Ersk. II. 9, 39. Moreover, the gift of the power, whatever its character be, does not appear in the conveyance until the clause assigning the writs. The power, therefore, given by A. Inglis to James I. Hamilton, could operate, at most, only as a mandate or commission, Ersk. II. 3, 23, and was necessarily limited to the life of the granter, whereas it had been exercised

CRAIG v. COCHRANE.

23d Sept. 1841.

Appellant's Argument.

by James I. Hamilton after Alexander Inglis had died. Still farther, even if the power did not fall by the death of A. Inglis, it could only be exercised as in his name, whereas the precept of clare constat by James I. Hamilton was made as plenus dominus in his own right. But moreover, the infeftment of James I. Hamilton, though it states narrativè the power in Alexander Inglis's disposition, makes no mention of the power expressly, as conferring any authority for the act about to be done, neither does it bear that sasine was given in respect of it.

2d, The crown charter of 6th August, 1772, contained a precept for infefting Duke Douglas personally, without mention of any other, and that under the fetters of the entail of the dukedom. This precept could not be a warrant for infefting another party, and in a liferent incompatible with the provisions of that entail.

3d, The precept of clare constat by James I. Hamilton in favour of himself, is inept, because he had not previously established, by service or otherwise, the death of Gavin without heirs of his body; and the precept is not, per se, any evidence of the failure of such heirs, without which James I. Hamilton had not any right to the lands.

II. With regard to that portion of Murdieston the superiority of which was conveyed by Alexander Inglis to Walter Hamilton in liferent, and Duke Walter in fee.

The sasine taken by Walter Hamilton upon the precept in the charter of 6th August, 1772, by virtue of the assignation of it in Duke Walter's conveyance to Alexander Inglis, of 21st September, 1772, and in Alexander Inglis's disposition of 24th September, 1772, exhausted the precept in the charter. Carnegie v.

Scott, Mor. 8858; Murdoch v. Cheslie, Mor. 6923. The infeftment, therefore, by Duke Archibald in 1801, upon the same precept, was void, and did not feudally vest the superiority in him. By necessary consequence, Duke Archibald had no power to enter vassals, and the precept of clare constat granted by him to James Inglis Hamilton on 27th November, 1802, with the infeftment that followed upon it, did not vest any right in that party.

Though Duke Archibald's infeftment was put upon record, that could not in any way better its validity; Wilson v. Agnew, 9 S. 357; Cleghorn v. Elliott, 11 S. 259; Agnew v. Stair, 3 S. 229; and still less could it have the effect of validating the titles of third parties in a case such as this, where there is not any question between two titles flowing from one and the same author, the one latent, and the other public — the case to which the act 1617, cap. 16 was alone intended to apply, — but where the competition is between two titles, both upon the record, and the question is as to the validity of one of the titles, upon other grounds altogether from those to which the statute is applicable.

Though there be, in the entry of a vassal, onerosity between him and his superior, by payment of the relief duties, and the obligation to perform the other prestations in the feu right, and though this onerosity may perhaps be considered as relieving the vassal to some extent from the consequences of omission by the superior in making up his titles, this cannot have any place in a case where the party giving the entry has not, in fact, any feudal title as superior; and Duke Archibald was not in any way the superior. Duke Douglas was infeft in the superiority, and on his death, that right descended to his heir, whom Duke Archibald never was; and,

CRAIG v. COCHRANE. 23d Sept. 1841.

Appellant's Argument.

for any thing done in the life of Duke Archibald, it remained in hæreditate jacente of Duke Douglas. Duke Archibald brought a reduction of Duke Douglas's infeftment, but the decree in that action could not operate retroactively to validate the precept of clare constat given by him to James Inglis Hamilton, the efficacy of which expired at his grace's death, while the decree of reduction was not until after his death. The decree might operate to perfect his grace's title to the dominium directum, but could not in any way affect the title to the dominium utile, never derived from him or his authors. Still less can the decree operate the latter effect to the prejudice of the appellant, who, and his predecessors, were not parties to the proceeding, more especially as the proceeding was pendente hoc lite, and in apparent collusion with the respondent; Erskine, II. 7, 3 and 4.

Admitting Duke Archibald to have been the feudal superior, James Inglis Hamilton, at the date at which he executed the new entail, held the lands in apparency only. That deed was executed on 15th June, 1802, and the precept of clare constat on which the maker was infeft, was not granted until November of that year. He had not, therefore, any power to make the entail at its date. Stair, III. 3, 43 and 59; Bank. I. 3, 133; Act 1695, cap. 22; Carmichael v. Carmichael, 16 F. C. 17. If so, the subsequent titles made up by James Inglis Hamilton could not validate the entail by accretion, as it was a gratuitous deed, and with warrandice from fact and deed only; Stair, II. 2, 2; Ersk. II. 7, 3 and 4.

But the title made up by James Inglis Hamilton subsequent to the date of the entail of 1802, was not itself valid. 1st, The brieve which he expede was for serving him heir in special and of line; but the Jury found him to be heir of tailzie, a character in regard to

Appellant's Argument.

which no question was put to them. 2d, The proceedings against the superior to compel an entry, and the precept of clare constat granted by Duke Archibald in consequence, bore no reference to the character of heir of entail, but were confined to that of heir in special and of line. A title thus made up did not feudally vest the lands in James Inglis Hamilton. Reid v. Wood, Mor. 14483; Cathcart v. Cassilis, Mor. 14447; and App. voce Service of Heirs, No. 2.

Finally, the disconformity between the record of the sasine taken by James Inglis Hamilton on Duke Archibald's precept, with the certificate of registration upon the instrument, is sufficient to invalidate the sasine, and make the title inept. Kibbles, 9 S. and D. 233; Fulton, 9 S. and D. 442; M'Queen, 2 S. and D. 637; Denniston, 3 S. and D. 285.

III. In regard to both portions of the lands.

The decree in the action of reduction, if it be in any way available, reduced the disposition by Duke Douglas to Alexander Inglis in 1772, and the dispositions by the latter to James and Walter Hamilton; their right, therefore, to the superiority was cut down, and then Gavin Inglis possessed only in apparency. In that case, the precept by James Inglis Hamilton flowed a non habente potestatem, and the precept by Duke Archibald becomes inept, as being in favour of James, as heir to Gavin, the heir last vest, whereas, in this view, Alexander Inglis was the heir last vest.

Respondent's Argument.

The Respondent. — I. As to the first half of the lands. The power expressly given to James I. Hamilton by Alexander Inglis's disposition to enter vassals, takes the case out of the principle, in regard to the want of such

CRAIG v. COCHRANE. 23d Sept. 1841. Respondent's Argument.

powers in ordinary liferenters, by constitution. Alexander Inglis had in him an absolute right to the superiority, as disponee of a party duly infeft, and without being himself infeft, he could indubitably convey the superiority to one in liferent, and another in fee; and if so, whether he could confer upon the liferenter the power of entering vassals, no way depended on his being himself infeft before doing so, but upon the completion of the title of the liferenter by infeftment. The general rule, that an ordinary liferenter, by constitution, has not power to enter vassals, does not proceed from any notion of incompetency in him to enjoy such a power, but from a presumption of law that it was not intended to be conferred upon him, but was reserved to the fiar. That there is not any incompetency, is shewn in the fact of the much more substantial powers, as to the enjoyment of the estate, in regard to leasing and perception of rents, which may unquestionably be conferred upon liferenters by constitution, and by the power as to entry of vassals confessedly enjoyed by a liferenter by reservation, though divested of the fee. Waddel v. Waddel, 16 F. C. 481; Swinton v. Roxburgh, 1st February, 1814, 17 F. C. 532; Forbes, Mor. 9931; Roxburgh, 25th June, 1818, 19 F. C. 541.

But that the power of entering vassals may be enjoyed by a liferenter by constitution, was expressly decided in Redfearn v. Maxwell, 7th March, 1816, 19 F. C. 111, where resignation ad remanentiam, into the hands of a liferenter by constitution, with power to enter vassals derived from fiars of the superiority, who were not then, or at any time, infeft, was deliberately sustained.

That the power was more than a mandate or commission, is evident from the nature of the deed by which it was given, which was to divest the granter out and out,

and give the right to James in liferent, with this power as a part of his right, and to Duke Douglas in fee; the death, therefore, of Alexander Inglis before the date of the precept which James granted in execution of the power, could not have any effect upon the validity of the precept, neither could it be at all necessary, that the precept should have been directed to the bailies of Alexander instead of James.

Whatever objection might be competent to the heirs under the entail of the dukedom of Hamilton, in respect of the use made of the precept in the charter of 6th August, 1772, that precept was a good warrant for infeftment as regarded other parties.

II. As to the second half of the lands.

Any objection to the infeftment taken by Duke Archibald, upon the precept in the crown charter of 1772, in respect of the precept having been exhausted by the previous infeftment taken upon it by Duke Douglas, was cured by the decree in the action of reduction by Duke Archibald, which found that the charter of 1772, with the retour of his grace's service, and his sasine upon the precept in the charter, "formed the only good right "and title to the lands, comprehending," &c.

That action was not directed against the liferenters of the superiority under Duke Douglas's conveyance, but against the fiars alone. The effect of the decree, therefore, was to find that the disposition of the fee of the superiority by Alexander Inglis to Duke Douglas, his heirs and assignees, did not prejudice the rights of Duke Archibald and the other heirs in the entail of the dukedom.

Although the decree pronounced by the Inner House was pronounced after Duke Archibald's death, yet in his

CRAIG v. COCHRANE. 23d Sept. 1841. Respondent's Argument.

lifetime the decree, to which the Inner House only adhered, had been pronounced by the Lord Ordinary, and was unrecalled; and before the interlocutor by the Inner House had been pronounced, the defenders in the action had, by minute, withdrawn from the litigation, so that the necessity of any interlocutor by the Inner House at all was done away with. The interlocutor of the Lord Ordinary thereby subsisted, without challenge, and the jus quæsitum which Duke Archibald had acquired in it ensures to him, and those claiming through him. At all events, the decree obtained by Duke Alexander, which was unobjectionable on any ground, validated the title to the superiority, not from the date of that decree, but from the date of the title; and the vassal being infeft after the superior, and not before, the necessary effect is likewise to validate the vassal's title.

If the effect of the decree, acccording to its terms, was to make the title of Duke Archibald, completed in 1801, the good title, and constitute him the true superior from that date, the necessary consequence is to validate the precept of clare constat, granted by him to James I. Hamilton in 1802. After the decree, the vassal could not, because of any previous real or supposed defect in his grace's title, have required him to make up his title of new, or have passed him over in case of refusal; every benefit from the decree which accrued to Duke Archibald's title accrued to James I. Hamilton's title, in respect of any defect in it, by reason of any previous objection to Duke Archibald's title.

When James I. Hamilton, in 1802, took the precept of clare constat from Duke Archibald, and made up his titles under it, his grace's infeftment as superior was upon record, and unchallenged. It was no part of James I. Hamilton's duty to question the validity of his

grace's title, nor was it within his power to do so; any challenge by him would have been at the risk of disclamation; neither could he have refused to take an entry, unless at the risk of declarator of non-entry. Stair, II. 4. 6; Ersk. II. 5. 40, and 41. Previously to accepting the precept from Duke Archibald, James I. Hamilton had charged the heir of line of Duke Douglas as well as Duke Archibald, to enter to the superiority. If the heir of line, or any other party, did not choose to challenge Duke Archibald's title, the only course that was left for the vassal was to acknowledge the title, and avail himself of it, for the purpose of obtaining an entry. In a question between parties claiming the dominium utile of lands, any irregularity or defect in the mode in which the party truly the superior may have made up his title to the superiority, cannot have effect given to it without involving the most inconvenient and most impracticable consequences, and has been disregarded even when the entry of the vassal was with a party not truly the superior. Wilson v. Irving, 5th March, 1805, not reported. In that case, an heritable bond, granted by a party who had made up his title by entry with the crown, and infeftment put upon the record after the crown had conveyed away the superiority, was sustained against an heir of the granter of the bond, who had made up her titles by entry with the true superior, passing by the granter of the bond, as never having been vested in the lands; the creditor in the bond being held entitled to rely upon the record, as shewing the vassal to have a good title.

The writs in the service of James I. Hamilton bore sufficient reference to the entail to make his service one as heir of entail; but objection on this ground is irrelevant, because the precept of clare constat, which he obtained

CRAIG v. COCHRANE.

23d Sept. 1841.

Respondent's Argument.

from Duke Archibald, was sufficient, without the necessity of any service; and that was expressly in his character as heir of entail; and even if a service were necessary, the retour is fortified by the vicennial prescription.

No objection to the sasine of James 1. Hamilton is libelled, and if it were, that which is taken must be unavailing; the date of the sasine itself, and the entry in the minute-book and the register are quite correct. The correctness of the attestation on the instrument is then of no importance. Act 1693, c. 14; 1696, c. 18; Stair, II. 3. 22; Ersk. II. 3. 42.

Though, as to this portion of the lands, James I. Hamilton had but a personal right at the date at which he executed the entail of 1802, the feudal title which he afterwards made up drew back to the date of the entail, and accresced to that deed. The granter not having made any adverse deed to which his title could by possibility relate, and the entail taking him expressly bound to make up such a title, so far as the title of the vassals was independent of the precept of clare constat by Duke Archibald to James I. Hamilton, it could not be affected by the decree in the reduction. The title made up by Gavin Inglis was in 1786, while the reduction was not brought till 1816; that title, therefore, was fortified by the long prescription, and, moreover, was not called in question by the reduction.

Ld. Chancellor's Speech.

LORD COTTENHAM. — My Lords, In this case, it appears that the entail of 1719 not having been properly fenced, General Inglis Hamilton, who became entitled under it to the property in question in 1802, created a new entail, under which the defender claims. The pursuer, who claims under the entail of 1719, does not pretend that that entail was incapable of being destroyed,

but contends that it was not effectually destroyed by the act of General Inglis Hamilton in 1802, upon the ground that the supposed superior through whom it was effected, had not at that time a proper feudal title, so as to enable him to give effect to it. This objection was in the course of the cause attempted to be supported upon various grounds, which have been since abandoned; and with good reason, as the answers given upon those points are conclusive. I propose, therefore, to confine my observations to those points which were still insisted upon in the cases before this house, and by the arguments of the counsel at the bar.

The superiority which had belonged to Douglas, Duke of Hamilton, was by him conveyed to Alexander Inglis, who conveyed it, as to one moiety of the lands, to General Inglis Hamilton for life, and to the Duke of Hamilton in fee; and as to the other moiety, to Walter Hamilton for life, and to the Duke in fee. General Inglis Hamilton completed his title under a precept of clare constat, granted by himself as superior; and the first objection to his title was, that being a liferenter by constitution, he had no power to enter vassals. Had he been merely a liferenter by constitution without more, the objection might have been good; but it has no application to the present case, for it was not in that character that he assumed the power, but under an express grant and conveyance from Alexander Inglis Hamilton, in whom the whole superiority was vested, "of full power to him, General Inglis Hamilton, during "his life, to enter and receive all vassals in the said "lands, and receive the composition due by law there-"for, fully and freely in all respects, without the con-"sent of the Duke and his foresaids, the fiar of the said "lands," — Alexander Inglis, by the same deed, con-

CRAIG v. COCHRANE. 23d Sept. 1841. Ld. Chancellor's Speech.

veying the superiority to him, General Inglis Hamilton, in liferent, and the fee to Douglas, Duke of Hamilton. That the owner of the superiority might dispose of that part of it which consisted in the right of entering vassals, to such persons, and for such interests, as he might think fit, is not disputed. It was therefore competent for him to convey it to the liferenter. To say that it would not pass as incident to the conveyance of the life estate, proves nothing, and no authority has been referred to for the purpose of proving that the owner of the superiority could not so grant this power; and if it was competent for him so to deal with, and dispose of, this power, he, beyond all doubt, did so dispose of it in favour of General Inglis Hamilton by this deed. This objection, therefore, wholly fails.

That Alexander Inglis was not himself enfeoffed is not insisted upon as affecting his right to pass any interest in the estate, to which he had a personal title, as with such interest he conveyed the means of obtaining the proper feudal title; but it is urged by the appellant, upon the supposition that General Inglis Hamilton's power of entering vassals was in exercise of a right vested in Alexander Inglis, and so exercised by virtue of an authority from him for that purpose, and as he, not being himself enfeoffed, could not enter vassals, it is urged that he could not delegate that power to others; all which reasoning assumes that General Inglis Hamilton acted, not by virtue of an interest or estate in the superiority vested in himself, but by virtue of a power delegated to him by Alexander Inglis, by virtue of the superiority remaining in him, Alexander, which was not the fact; and yet upon this misapprehension the whole of the first reason of the appellant's case is founded.

The second reason stated in the appellant's case was,

that James Hamilton had no power to grant a precept of clare constat in his own favour, as nearest and lawful heir of tailzie to Gavin Inglis, without establishing in the first place the death of Gavin, and the extinction of his heirs, in terms of the entail of 1719. That Gavin did in fact die without issue entitled under the entail, and that General Inglis Hamilton was at the time entitled as next heir of tailzie under that entail, is not disputed; and that he made up his title as such is proved by the retour of his special service of the 7th of September, 1802, which states the death of Gavin, and that Inglis Hamilton was the propinquior et legitimus hæres talliæ, and the other documents referred to in the appendix to the appellant's case. He stands, therefore, upon the record as nearest heir of tailzie, which character it is not disputed that he in fact holds.

As to this portion of the estate, it appears to me that the objections raised to the respondent's title are not maintainable.

As to the second portion of the estate, as to which in September, 1772, the superiority was conveyed to Duke Douglas in fee, and Walter Hamilton in liferent, the objection was, that Archibald, Duke of Hamilton, had not made up a legal title to the superiority when he granted the precept of clare constat in favour of General Inglis Hamilton, and that it was therefore null and void; and the objection to Duke Archibald's title is alleged by the appellant to consist in this, that the precept of sasine contained in the crown charter of 1772, was exhausted by the sasine taken in favour of Duke Douglas in fee, and Walter Hamilton in liferent, and consequently, that the infeftment taken by Duke Archibald in 1801, upon the same precept, was inept and null.

CRAIG v. COCHRANE. 23d Sept. 1841. Ld. Chancellor's Speech.

The facts appear to be, that Duke Douglas, holding the superiority entail under which Duke Archibald was heir, was not justified in taking to himself the fee-simple in 1772; and consequently, in 1801, Duke Archibald procured himself to be served as heir of entail, and took infeftment accordingly under the precept in the charter of 1772, which was in favour of Duke Douglas and his heirs of entail. The infeftment thus taken by Duke Archibald was in conformity with the precept and the charter, which the infeftment of Duke Douglas was not; and in 1802, when General Inglis Hamilton made up his title under the clare constat from Duke Archibald, he, the Duke, appeared upon the record as regularly enfeoffed of the superiority. But this is not all, for, as if to remove all possibility of error, General Inglis Hamilton previously obtained letters of horning against superiors directed to the heir of line of Duke Douglas, to the trustees under his trust-settlement, and to Duke Archibald, calling upon them severally to obtain themselves entered and enfeoffed, and to complete the title of him, General Inglis Hamilton, to the dominium utile. Neither of the former parties made any claim under this proceeding, but permitted Duke Archibald to take enfeoffment as before stated, and thus to become feudally vested in the superiority; and so he continued enfeoffed up to the time of his death, and those who claim after him, under the same title, so continued enfeoffed up to the present time.

The vassal, therefore, in this case, did all that could be done to ensure his own title, and if, after all this, any objection can be raised to such title through any supposed defect in the title of the superior, it is obvious, that it will be impossible in many cases for vassals to

obtain unimpeachable titles. Apprehensions are expressed on the part of the appellant, of the grounds upon which the Court of Session proceeded upon this point, but such apprehensions appear to me to be wholly misplaced. Not only danger to property, but necessary insecurity would arise, from the Court recognizing the doctrine contended for by the appellant.

This question, indeed, does not appear to have been decided for the first time in the present proceeding, for in 1817 Duke Archibald raised a process of reduction and declarator for reducing the title made by Duke Douglas in 1772, and, separatim, for having it found and declared, that the Duke Archibald, by the aforesaid title completed in 1801, had the only right and title to the property which included the superiority in question; and that the title so made up in 1801 constituted the only good right and title; and in that process, decree in terms of the conclusions of the libel was pronounced by Lord Pitmilly, and adhered to by the Court; and owing to some alleged informality in those proceedings, a decree has since been pronounced in terms of Lord Pitmilly's interlocutor.

It appears, therefore, that the title to the superiority, under which General Inglis Hamilton made up his title in 1802, and under which the respondent now claims, has been the title upon record for nearly forty years; and that the Court of Session has twice declared, that it constitutes the only good right and title to such superiority; and in this title all persons who could have claimed the superiority by adverse title, have acquiesced.

By the English law of copyholds, the copyholder can only complete his title through the intervention of the lord, but the act of the lord is considered as merely ministerial; and if the title of the copyholder was capable

CRAIG v. COCHRANE. 23d Sept. 1841.

of being affected by any defect in the title of the lord, this tenure, now sufficiently inconvenient, would become perfectly intolerable.

Ld. Chancellor's Speech.

This is a case of purely Scotch conveyancing, in which this House would, under any circumstances, be very unwilling to act in opposition to the unanimous opinion of the Judges of the Court of Session, by whom the case was decided. I have, however, in this, as in all other such cases which have come before this House, thought it my duty to examine the authorities cited, and the arguments urged against the judgment appealed from, and I have had much satisfaction in finding so much of reasoning and authority in support of a judgment which I consider of the highest importance to the security of property in Scotland. I therefore move your Lordships to affirm the interlocutor appealed from with costs.

Judgment of Court.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

GEO. WEBSTER — RICHARDSON and CONNELL, Agents.

[Heard, *May* 18, 1840. — Judgment, *Sept.* 23, 1841.]

ELIZABETH IRVINE, or DOUGLAS, and others, Appellants. (No. 18.)

[*Attorney-General.—Pemberton.*]

JOHN KIRKPATRICK, Esq. Advocate, Respondent.

[*Lord Advocate.*]

Passive Titles. — Service by heiresses-portioners for the purpose of conveying Scotch estate to trustees in implement of the marriage-settlement of one of the heiresses, in which settlement the ancestor had bound himself to provide the particular heiress in one-third part of his whole property, (power of disposal during his life, and to charge with legacies, being reserved by him, and conveyance accordingly,) was such a representation as would subject the heiresses in liability for the ancestor's debts; the other heiresses having, under the will of the ancestor, taken the other two-thirds of his property, which was situated in England, on condition of making the conveyance in implement.

Jurisdiction. — Found, that the Court of Session had jurisdiction, ratione contractus, over an heiress-portioner, liable for the debts of her ancestor upon the passive titles, as served to a Scotch estate though for the purpose merely of conveying it away, and as possessed of the mid-superiority of the lands, without regard to whether she had been forty days within Scotland at the time of her personal citation.

Process. — No objection for want of parties, that in an action on the passive titles, against heiresses portioners

served for the purpose of making a conveyance in implement of obligations upon the ancestor, and in fulfilment of his will, the trustees of the will, who were resident in England, had not been called.

1st Division.

Lord Ordinary Cunninghame.

Statement.

CHARLES IRVINE, who had been a merchant in the Island of Tobago, died in the year 1798, in Scotland, where he had been some time domiciled. He left no will, nor any issue, but was survived by two brothers, Walter and Christopher, and four sisters, Isobel, otherwise Kirkpatrick, Margaret, otherwise Glissan, Anne, otherwise Burn, and Eleonora, otherwise Wardrop. He was likewise survived by his widow, Rosina Irvine, who, by her marriage-settlement, had renounced her legal provisions in consideration of an annuity of L.500.

Walter Irvine had likewise been a merchant in Tobago, but had returned to this country in 1796, and was resident there at the time of Charles's death in 1798. Christopher was a lawyer in Tobago, and residing there at Charles's death; the sisters were at this period all resident in Scotland. The sisters were confirmed executors to Charles qua his nearest of kin.

On the 25th December, 1798, Mrs Burn and her husband, and in the months of May and June, 1800, the other sisters, Mrs Glissan, Mrs Wardrop, and Mrs Kirkpatrick, respectively assigned to Walter their shares of Charles's moveable estate, the consideration in the case of Mrs Burn being an annuity of L.100 to her and her husband, and the survivor of them; and in that of the other sisters a payment to each of them of L.2250.

In 1821, Lord William Douglas had been married in England, where both of the parties were then resident, to Elizabeth Irvine, one of the daughters of Walter. Previous to the marriage, a deed of settlement had

been executed in the English form, to which the father of the lady was one of the parties. By this deed, Walter Irvine bound himself, his heirs, executors, and administrators, to secure to Messrs Bruce and Herries, trustees of the settlement, one-third of the real and personal estate, wherever situated, of which he should be possessed at the time of his death, upon trust, to pay the yearly income to Lady Douglas for her life, for her separate use, and to Lord William Douglas for his life, in case he should survive her; and after the death of the survivor, upon trust for the children of the marriage. The provisions in this settlement were accepted by Lady Douglas, "in lieu, for "recompense, and full satisfaction of and for all "manner of dower, right and title of dower, third and "free blench, either at common law, by custom or "otherwise," competent to her.

In 1824, Walter Irvine died, being then, as he had been for many years before, domiciled in England. At his death he was possessed of a landed estate in Scotland, but he had never been domiciled there, after he went to Tobago in 1796. He left surviving him three daughters, Lady Douglas, and Christian and Catherine Irving.

He left a will executed by him in the English form, whereby he devised his whole real and personal estate to trustees and executors, of whom Lord William Douglas was one, in trust, and directed that his daughters, and all others claiming benefit under his will, should, within six months of his death, or of their coming of age, execute a proper deed in the Scotch form, "so as to enable the "trustees of this my will to carry my will into complete "effect."

The first purpose of the trust was expressed in these

IRVINE and others v. KIRKPATRICK. 23d Sept. 1841. Statement.

terms: — "In the first place, I direct that the covenant "entered into by me, on the marriage of my daughter "Elizabeth, with the said William R. K. Douglas," meaning Lord William Douglas, "and contained in the "settlement, or articles for a settlement, made on that "marriage, shall be performed or satisfied by an appro- "priation to be made by the trustee, or trustees, for the "time being, of this my last will, of all my messuages, "lands, tenements, and hereditaments, or heritable "estate in the county of Fife, in Scotland, whether the "same may be, or may not be, of greater value" than one-third part.

Another purpose of the trust was to hold L.35,000, for each of the testator's daughters, Christian and Catherine, and their families, the capital being always to be kept under the trust; the continuance of which was provided for by a clause to that effect.

On Walter Irvine's death, the trustees accepted of the office, and took possession of his entire property. In July, 1824, Walter's daughters procured themselves to be served heiresses portioners to their father, and in October following, they were infeft upon a precept from Chancery. In January, 1825, they expede a crown charter of resignation, on which they were infeft in certain lands as to which their father had been infeft in the dominium utile, but, as to the superiority, had only a personal right; and thereafter they took up the dominium utile, by granting precept of clare constat in their own favour, on which they took infeftment. As to other lands which had been held by their father of subject superiors, they made up their titles by precept of clare in ordinary form.

Thereafter the daughters, along with the trustees under the will, by one deed, conveyed the lands in

Scotland to the trustees of Lady Douglass's marriage-settlement, on a recital of the covenants in that behalf in the settlement; and that it was made "in implement "of the obligations incumbent upon us respectively, as "before-mentioned." After the description of the lands followed these expressions: — "And which lands, "and others above disponed, have been appropriated in "terms of the said will of the said Walter Irvine, "towards performance of the covenant entered into "by him on the said marriage of me, the said Elizabeth "Irvine or Douglas." The disposition contained an indefinite precept, upon which the marriage trustees were infeft base, and entered into possession.

Walter Irvine left only about L.5258, of personal property in Scotland, the greater part of that sum consisting of arrears of rents. Lord William, as one of the executors, took out confirmation, and after uplifting the monies, transmitted them to England, the place of general administration of the estate.

In 1833, the respondent, as residuary disponee and legatee of Margaret Irvine, brought an action against the appellants, among others, for the purpose of constituting his rights in these characters. That action was met by a defence on the part of the appellants, that they "were the representatives of Walter Irvine," that he was the heir-at-law of his sister Margaret, and that the deeds in favour of the respondent affected only personalty, and gave him the character of legatee alone.

In the year 1837, Kirkpatrick, the grandson of Mrs Kirkpatrick, and her executor dative, and the representative of Mrs Glissan and Mrs Burns, brought an action against Lady Douglas and her husband, and Christian Irvine, the other surviving daughter of Walter Irvine, (Catherine being dead,) for reduction of the

IRVINE and others v. KIRKPATRICK. 23d Sept. 1841.

Statement.

assignations which Walter's sisters had, in 1798, granted to him of their interest in the estate of their brother Charles, upon various grounds; and for an account of their own, and Walter's, intromissions with that estate. Christian Irvine had been domiciled and resident in England from the time of her birth, but at the time this action was raised, she happened to be residing with her sister, Lady Douglas, in Scotland, on a temporary visit, and the summons was served upon her personally, but she had not at this time been forty days within Scotland.

The defences to this action were purely preliminary, That the defenders were not the representatives of Walter Irvine, that Christian Irvine was not subject to the jurisdiction of the Court, and that all parties interested had not been called. The Court, on 17th February, 1838, "repelled the preliminary defences" for Lady Douglas, and appointed parties to lodge minutes "as to the question of jurisdiction, relative "to the interest of Miss Christian Irvine." These minutes were given in, and upon advising them, the Court, on 23d June, 1838, "sustained the jurisdiction, "and repelled the preliminary defences for Miss "Christian Irvine."

The defenders, with the leave of the Court, appealed against these interlocutors.

Appellant's Argument.

The Appellants. — I. One conclusion of the action is for an account; this cannot be had without the executors and trustees of Walter Irvine, the parties who truly did intromit. The other conclusions are ex delicto, for reduction of documents which are not in the possession of the appellants, but of the same trus-

tees, from whom the appellants cannot force them, so as to obey the call made upon them by the summons, "to exhibit and produce," &c. Though the appellants did serve as heiresses portioners, it was not with the view of taking, nor did they in fact take, any benefit by so doing. Their service was for the mere formal purpose of conveying to the marriage trustees, in implement of Walter's will, and of the covenants which he had previously come under. Such an act is not sufficient to infer liability, even in a question with ordinary creditors, which the respondent is not. Blount, Mor. 9731; Fife, 7th March, 1828, 6 S. 698; M'Kay, 13th January, 1835, 13 S. and D. 246; Nisbet's Trustees, 20th February, 1835, 13 S. and D. 497. The executors and trustees of Walter Irvine are his representatives, and ought alone to have been made defenders. Any benefit which the appellant, Lady Douglas, may already have received, or may yet receive, comes through these executors and trustees; and the claim of the respondent may, for aught known, have been already settled by these parties in England. But neither Catherine nor Christian took any benefit whatever from the Scotch estate.

II. The appellant, Christian Irvine, was no way subject to the jurisdiction of the Court below. She was on a temporary visit, but was never domiciled, or permanently resident in Scotland, without which there cannot be jurisdiction against her; Ersk. I. 2.; 16 Voet. VI. 1. 92; and jurisdiction had not been founded against her by arrestment. Any estate that might be said to be in her by reason of the base holding of the trustees, was a valueless mid-superiority, defeasible at any time.

IRVINE and others v. KIRKPATRICK.

23d Sept. 1841.

Appellant's Argument.

III. If there be not jurisdiction against Catherine Irvine, then the action is defective for want of parties, inasmuch as being directed against heiresses portioners, it must embrace the whole of them, and in that view she will not be before the Court. M'Millan, Mor. 14683. Furthermore, the action is defective, by reason that Walter Irvine's trustees are not parties, although they have a manifest interest to support the deeds sought to be set aside. They are the fiars, while the appellants are but the liferenters; and moreover, they are the only parties who can effectually maintain the defence of these deeds, and therefore, it is no answer to this defence to say, that the trustees are not within the jurisdiction, —that only shews that the respondent has chosen the wrong forum.

Respondent's Argument.

The Respondent. — I. Service as heir makes the party expeding it eadem persona cum defuncto, and liable for all his obligations; the only exception is where the party serving avails himself of the statute 1695, cap. 24, by serving cum beneficio inventarii. Ersk. III. 8. 68. Even then he is trustee for creditors, and can only discharge himself by shewing payment to them to the extent of the succession. Walter Irvine's estate was liable in his hands to the payment of his debts, and the claim of the respondent among the rest. The whole effect of the marriage-contract was to bind him not to disappoint Lady Douglas of one-third of his free succession at his death, that is, free after payment of his debts; and the respondents, by expeding service, and taking infeftment as his heirs, and pleading moreover in that character, have made themselves the representatives of their father, liable for all his obligations. The cases referred to by the appellant relate only to general

services, and to questions inter hæredes, but have no application to special services, where something must necessarily be taken up by them.

Respondent's Argument.

II. The appellant, Christian Irvine by the representation to her father which she established in her person, entered into a contract of liability for her father's debts within Scotland, and therefore, ratione contractus, is subject to the jurisdiction of the Scotch Courts; Wyche v. Blount, Mor. app. 2. Forum Competens; more especially as she has been personally served. The fact of her residence being animo revertendi to England, is unimportant. The action is quasi ex contractu; the deeds are the only bar to an accounting, and when they are set aside, it will then take place. Moreover, she is liable to the jurisdiction by reason of the mid-superiority to a Scotch landed estate, which still remains vested in her person.

III. If the action is well founded on the other grounds, it cannot be defective because the trustees are not parties; they are not resident in Scotland, and an heir is bound to answer at the suit of a creditor, without the necessity of calling the executor.

Ld. Chancellor's Speech.

LORD COTTENHAM. — My Lords, This appeal is upon preliminary defences only, and does not touch the merits of the question between the parties; but as the relative situation of the parties is material to the consideration of these preliminary defences, a short statement of the transactions impeached is necessary to explain the opinion I have formed on these defences.

Walter Irvine had a brother, Charles, and several sisters. Charles died domiciled in Scotland, and his

Irvine and others v. Kirkpatrick.

23d Sept. 1841.

Ld. Chancellor's Speech.

property thereupon became divisible between Walter and his sisters. Walter entered into arrangements with his sisters, by which he purchased their shares in Charles's property. This took place in 1800. The respondent, the pursuer, represents the sisters, and impeaches this transaction as fraudulent; and the object of the suit is to reduce and set aside these transactions, and to obtain payment of the property of Charles, received by Walter, which, but for those transactions, would have come to the sisters.

The deeds in question were executed in Scotland, and Walter had an estate in Scotland, which he did not dispose of according to the forms of the law of Scotland. He died domiciled in England, and left three daughters, the appellants, Elizabeth, the wife of Lord William Douglas, and Christian Irvine, and Catherine, who has since died unmarried. The domicile of Lord and Lady William Douglas was in Scotland, and as to them there is no question of jurisdiction, but the domicile of Christian was in England. She was, however, at the time process was served upon her, in Scotland, upon a visit to her sister, Lady William Douglas, but she had not been there forty days. Walter's will was proved in England by Lord William Douglas, and two other executors, but although Lord William Douglas is a defender, the summons does not seem to seek to make him liable in that character of executor, but is addressed to the daughters of Walter Irvine, as his heirs-portioners, or otherwise, served "and retoured to him, or "as otherwise representing him on one or other of the "passive titles known in law."

It appears, that upon the death of Walter, his three sisters, the two appellants, and Catherine deceased, were served and retoured heirs-portioners of Walter, and

that they completed their feudal titles as such; of part of the property Walter was also entitled to the superiority, and other part he held under other superiors; and the heirs-portioners completed their title to the superiority to which Walter had been so entitled, as well as to the dominium utile of the whole. Upon this statement of the facts, if there had been nothing else in the case, there would not, I apprehend, have been any doubt of the liability of these heirs-portioners to answer to any creditors of the deceased, they having so taken possession of his estates, and made up their titles without any inventory or protection against such liability.

It was indeed said, that the pursuer was not for this purpose to be considered as a creditor, because it was necessary for him in the first instance to reduce and set aside the assignment which Walter had obtained from his sisters. But the object of the suit is to obtain from those who represent Walter, those parts of the funds of his brother Charles, which by law devolved to his sisters. If the right to those funds be established, the claim of the pursuer will be strictly that of a creditor. Why, therefore, is he to be deprived of the mode of obtaining payment of his debt, which the law of Scotland allows to other creditors, because a preliminary question must be decided in his favour before his title as a creditor can arise? Every disputed debt requires an adjudication establishing it, before the title to the remedy can be applied. No case has been cited to establish this distinction between the present claim, and the claim to any other debt; and there does not appear to be any ground for it upon principle.

It was then said, that if the pursuer was entitled to the ordinary remedy of a creditor, the defenders, as heirs-portioners, are in no wise liable to be sued for

IRVINE and others v. KIRKPATRICK.

23d Sept. 1841.

Ld. Chancellor's Speech.

such debt; and the reason assigned was, that they took nothing from the debtor whose estate they inherited. This was attempted to be made out from the provisions of the settlement made upon the marriage of Lady William Douglas, by which Walter Irvine, her father, covenanted that she should have, for the purposes of her settlement, one-third in value of the property he might be possessed of at the time of his death, but subject to an absolute power of disposition in his lifetime, and to a power by will to charge the property with such legacies and annuities, and other charges, as he might think proper, to any extent. This one-third in value could only be what should remain after payment of his debts. If, therefore, his real estate in Scotland was subject to the present claim, it was so subject in preference to any claim under the covenant.

Walter, by his will, directed that his Scotch estate should be settled on the trusts of Lady William Douglas's settlement, in execution of his covenant; and he gave L.35,000 to each of his other daughters, and the residue equally between the three; and so well aware was he that he had no power by such will to dispose of the Scotch estate, that he directed that all his daughters should concur in the disposition of it, and if they refused so to do, that the principle of election according to the English law should be applied to them. Upon his death, the daughters, as heirs-portioners, became entitled to the Scotch estate, and they, and each of them, might have held and enjoyed it, or her portion of it, as such heirs-portioners, but they could not do so, and at the same time claim the benefit of the provision intended for them by their father's will. They therefore concurred in carrying his intentions into effect, and in conveying the estate to the trustees of Lady William Douglas'

settlement, that is, they sold their interest in the estate for the benefits provided for them by the will; and then it is said that they were not lucratæ by the inheritance to which they succeeded. Had they merely succeeded to this inheritance, or elected to enjoy the estate as heirs-portioners, they would have been lucratæ to the value of their shares, but responsible for their father's debts. Are they to escape from this responsibility, because, instead of being lucratæ to the amount of their shares, they are enabled, by conveying such shares for the purposes of Lady William Douglas' settlement, to procure for themselves the benefits provided for them by the will, which probably exceeded the value of such shares.

The cases referred to, in which heirs having no beneficial interest in the estate, make up their titles only for the purpose of conveying it to those who are beneficially entitled to it, can have no application to this case. The appellants, therefore, are heirs-portioners lucratæ, who have made up their titles and entered as such, without the benefit of inventory, and so become liable to the pursuer's suit.

It was said that the trustees of Walter Irvine, that is, those who proved his will in England, ought to have been parties; but independently of the answer, that none of them except Lord William Douglas were in Scotland, the objection assumes that an heir who has incurred the passive representation by his mode of dealing with the estate, cannot be sued by a creditor without also suing the personal representative, for which there does not appear to be any authority.

The remaining ground of the appeal is, that the appellant, Christian Irvine, was not liable to the jurisdiction of the Court of Session, because her domicile

IRVINE and others v. KIRKPATRICK.

23d Sept. 1841.

Ld. Chancellor's Speech.

was English, and she had not been in Scotland forty days before service of the process. But this domicile after forty days for the purpose of jurisdiction only, does not seem to apply where the Court had original jurisdiction over the subject matter, and certainly does not apply where the party served is sought to be affected by virtue of property in Scotland. In the present case, the subject matter of the suit is the property of Charles, the brother of Walter Irvine, who was a domiciled Scotchman; the deeds sought to be set aside were executed in Scotland, and respected that property; and the liability sought to be attached upon the defenders, the appellants, depends upon their mode of dealing as heirs-portioners with a Scotch estate. The forty days are required when the jurisdiction is assumed ratione domicilii, but if Christian Irvine was subject to the jurisdiction at the time she entered upon, and made up her titles to the land, can she escape from that jurisdiction, (being personally served,) upon the ground that her domicile was English, and that she had not been forty days in Scotland, and was there only upon a visit? If jurisdiction once attaches ratione contractus, it continues to operate, although the defender has his domicile elsewhere. If it were necessary, in order to support the jurisdiction, to shew that she had immoveable property in Scotland at the time the citation was served, it appears that the fact is established, that she is still possessed of the superiority of part of the estate. It was said, indeed, that it was of no value, but that does not appear. The appellant's argument seems to assume, that if a person not domiciled in Scotland incurs a passive representation by dealing with the estate of the debtor, and therefore becomes liable to the jurisdiction of the Courts in Scotland, so long as he continues to hold such estate, he

can escape from such liability, and bid defiance to that jurisdiction, if he sells the estate, though personally served with process, if he has not resided forty previous days in Scotland. No authority has been referred to in support of such proposition, and there does not appear to be any reason to support it. If a Court have jurisdiction over the subject matter, and the party against whom the claim is made be properly brought before it for the purpose of resisting the claim, there does not appear to be any reason for the Court declining to exercise such jurisdiction. Such is the rule in this country, and I see no ground for extending a contrary rule in Scotland, beyond what the established practice of the country has laid down. With respect to the other parties alleged to be proper parties to this litigation, none of them appear to be in Scotland, and no authority has been cited to shew that the suit cannot, under such circumstances, proceed in their absence. In the Courts of Equity of this country, suits proceed in the absence of parties out of the jurisdiction, who, if within it, would be necessary parties to the suit, except in cases where the decree cannot be carried into effect in their absence. For these reasons, I move your Lordships that the interlocutors appealed from be affirmed with costs.

Ld. Chancellor's Speech.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

Judgment.

ARCH. GORDON — RICHARDSON and CONNELL, Agents.

[Heard, *July* 13, 1840. — Judgment, *Oct.* 26, 1841.]

(No. 19.)

JAMES LAIDLAW, Writer in Edinburgh, Appellant.

[*Knight Bruce — James Anderson.*]

JOHN SMITH, Trustee on the Sequestrated Estate of H. W. GARDEN, Respondent.

[*Lord Advocate — Pemberton.*]

Arrestment. — If facts shew, that an arrestee could not, when he paid his creditor, have been cognizant of the arrestment having been used in his hands, he will not be liable to make second payment to the arrestor.

Process. — If a party allow judgment to be made upon statements not contradicted by him, he cannot, upon appeal, ask issue as to their truth.

2d DIVISION.

Lord Ordinary Moncreiff.

Statement.

SMITH, the respondent, a builder, residing in Glasgow, was trustee on the sequestrated estate of Garden. Messrs M'Gregor and Murray, writers in Glasgow, were his agents in that city, and Messrs Dundas and Wilson, W.S. were his agents in Edinburgh.

Smith, in his character of trustee, required from Dunlop, who was a writer to the signet, residing in Edinburgh, the delivery of certain title-deeds of the bankrupt, Garden's, property. Dunlop refused on a plea of lien. This claim of lien became the subject of negotiation between Dunlop and Smith, through the

Glasgow and Edinburgh agents of Smith. In the course of this negotiation, money was, on the 14th of May, remitted by Smith to Dundas and Wilson, with instructions to arrange the claim, and obtain delivery of the deeds.

On the 19th of May, 1831, Laidlaw, the appellant, on the dependence of an action by him against Dunlop, used arrestments against Dunlop, in the hands of Smith, to the extent of L.2000. The arrestment was used by the messenger leaving a copy at the dwelling-house of Smith. Smith had left Glasgow on business previous to the 19th, and was not returned at the time the execution of arrestment was left at his house.

On the same day, viz. the 19th May, Dundas and Wilson wrote M'Gregor and Murray, stating, that they thought Dunlop's claim ought to be admitted to the extent of 210. On the 20th of May, M'Gregor and Murray wrote Dundas and Wilson, approving of their opinion, and authorizing them to settle the matter accordingly.

On the 21st of May, Dundas and Wilson wrote M'Gregor and Murray, that two days previously, Dunlop had said something of arrestments having been used against him, and desiring to be informed upon the subject in course of post. After this letter had been despatched, and on the same day, the wife of Dunlop called at the chambers of Dundas and Wilson, and exhibited to them a letter from her husband, in which he stated, that he had been to Smith, and M'Gregor and Murray, on the 20th, to inquire of these gentlemen, whether any arrestments had been used against him, and found none.

No mention, of arrestments having been used, occurring in M'Gregor and Murray's letter to Dundas and

LAIDLAW v. SMITH.

26th Oct. 1841.

Statement.

Wilson, written on the 20th, Dundas and Wilson did not wait for an answer to their letter, written on the 21st; but in the course of that day, paid the wife of Dunlop L.130.

On the evening of the 21st, Smith returned home for the first time after the arrestment had been used, and found the execution lying at his house, without any intimation of its existence, so far as appeared, having been made in his absence by the members of his family either to M'Gregor and Murray, or to Dundas and Wilson. On the evening of the 21st, M'Gregor and Murray wrote Dundas and Wilson, informing them of the arrestment, and that no farther payment ought to be made.

On 28th February, 1833, Laidlaw obtained decree in his action against Dunlop for the sum of L.450, 3s. 6d. In June following, he brought action of forthcoming against Smith, libelling that he had paid Dunlop the sum of L.140, in breach of the arrestments used on the dependence of his (Laidlaw's) action against him, and concluding for payment of the amount contained in his decree, or of whatever sum might have been paid to Dunlop after the date of the arrestment.

A record was made up on the summons and defences, and condescendence and answers, in which the pleas of the appellant, so far as they became the subject of decision in the Court below, or in the appeal, were, — 1st, That Smith was indebted to Dunlop in L.130 at the date of the arrestment having been used, and ought, therefore, to make that sum forthcoming; 2d, That it was not necessary to the validity of an arrestment that it should have come to the personal knowledge of the arrestee; 3d, That the money, though actually in the hands of Dundas and Wilson, was constructively, for

the purposes of this action in the hands of Smith, until it was paid over to Dunlop.

The plea of the respondent in defence was, that he was not liable in second payment, inasmuch as he had, prior to the arrestment, remitted funds to his agents, at the place of the creditors' residence, specifically to be appropriated to his payment; and the payment had been made in ignorance of the arrestment both by him and his agents, without any blame being imputable to them in respect of such ignorance.

On considering the record, the Lord Ordinary, Moncrieff, on 12th May, 1836, pronounced this interlocutor, and added the note subjoined[1]:—

"The Lord Ordinary having considered the closed "record, and heard parties' procurators thereon, and "made avizandum, Sustains the defence set forth in

---

[1] "*Note.*—This case appears to the Lord Ordinary to be much more nice "than the counsel on either side were willing to admit; and though he "thinks it, on the whole, a special case, in which the defence must prevail, "care must be taken that the general principles of the law shall not be sup- "posed to be trenched upon, or loosened.

"Mr Erskine, in a passage not referred to in the debate—3, 16, 14—"speaking of the arrestee's liability for the civil consequences of breach of "arrestment, under the statute 1581, cap. 18, says expressly, 'This doctrine "'holds also in the case of arrestment served against the arrestee only at his "'dwelling-house, though in fact the execution should not have been notified "'to him; for the admitting pretences of ignorance might evacuate the lawful "'diligence of creditors.' The Lord Ordinary does not find, that any other "institutional writer has laid down precisely the same doctrine, or that there "is any reported decision to this effect; and, if it were taken, in its broadest "sense, as importing, that wherever an arrestment had been duly executed "at the dwelling-house, breach of arrestment must be incurred, simply by "the fact of payment being made after the time of the execution, without "regard to the circumstances of ignorance under which the payment might "be made, the Lord Ordinary should entertain great doubt of the soundness "of it in its application to many cases which may easily be figured. For "example, a merchant leaves his dwelling-house in the morning, and, at his "counting-house, pays a debt at 12 or 1 o'clock, and it turns out that, "unknown to him, an execution of arrestment had been left at his house soon "after he had quitted it. A farmer leaves his house to attend at a distance, "meets with his creditor, and pays the debt; and finds, on returning home,

LAIDLAW v. SMITH. 26th Oct. 1841. Statement.

"the first plea in law for the defender, assoilzies the defender, and decerns: Finds expenses due, and remits the account, when lodged, to the auditor to be taxed."

"that an arrestment had been used before he made the payment. A trader "empowers his traveller to pay a debt to a creditor at a distance, and the "instruction is obeyed; while, in the meantime, an arrestment had been laid "in the interval at the trader's domicile. In such cases, it would be a very "hard law, which would say, that the debtor, so in bona fide paying his "lawful debt, must be answerable, as for breach of arrestment, to pay it a "second time; and it would be peculiarly severe so to construe a statute like "that of 1581, seeing that, under the very same enacting words, the party "might have been prosecuted criminally, and have suffered escheat of goods, "and even corporal pains. This could never be held; and, therefore, Mr "Erskine's position must be understood with considerable modification.

"Nevertheless, the authority is of weight; and the Lord Ordinary does "not doubt, that thus far the doctrine may be well founded, that the mere "fact of the debtor having no personal notice or knowledge of the arrestment "will not liberate him from the civil consequences of paying in the face of it, "if, before he paid, he was in such circumstances that he ought to have "known of it, and so must be presumed to have known it. Any other rule "would certainly give occasion to pretences for evacuating the diligence of "creditors.

"The case here is, 1st, That before any arrestment had been used, the "money, or all but a trifle, had been actually remitted to Messrs Dundas and "Wilson in Edinburgh, and they had been, without any limitation, autho-"rized to settle and pay the debt. 2d, That after having so remitted and "instructed them, Mr Smith, still before any arrestment, had left his house "in Glasgow, and gone to a distance in the country. 3d, That on the 19th "May, 1828, while he was still absent, the arrestment was executed at his "dwelling-house in Glasgow. 4th, That on the 21st, the debt was paid by "Messrs Dundas and Wilson in Edinburgh, they being then in ignorance "that any arrestment existed, and so paying in bona fide. There are some "intermediate facts, of some importance, which are founded on by the pur-"suer as making a special case against the defence. But in so far as there "is any general question of law raised, the facts above enumerated seem to "constitute the case.

"In this view of it, it appears to the Lord Ordinary, 1st, That the arrest-"ment was competently laid on, notwithstanding the remittance to Dundas and "Wilson; and that the case of Ballandene, 12 S. D. and B. 402. February 6, "1834, was decided essentially on the fact that the proper debtor stood actually "discharged. But 2d, That the remittance having been made, and unlimited "instructions given, before arrestment, the payment made in bona fide by the "Edinburgh agents, before notice of any arrestment, does not constitute a "breach of arrestment to render Mr Smith liable in second payment to the "arrester, unless it appeared, which it does not on this record, that Mr "Smith had returned to his dwelling-house, or at least to Glasgow, in such

The appellant presented a reclaiming note to the second division of the Court. On considering this note, the Court appointed the parties to give in minutes of debate. And thereafter, on 25th January, 1838, the

26th Oct. 1841.

Statement.

" time that he might have stopt the payment. The important specialty is, " that before the arrestment, the debt, and the discretion in paying it, were, " in fact, out of his hands, and committed to Dundas and Wilson; and " therefore it appears to the Lord Ordinary, that as Mr Smith did nothing " after the arrestment, that is no ground for any presumption against him to " infer liability for second payment, unless a special case of negligence by " him or others can be made out.

" The precise state of the other facts requires attention. Messrs Dundas " and Wilson having made up their minds as to the sum which should be " paid to Dunlop, wrote to this effect, to Messrs M'Gregor and Murray, on " the 19th May. On the 20th, M'Gregor and Murray wrote a short letter, " distinctly authorizing the settlement to be made on the footing stated. " But it is very material to observe, that in that letter, there was no notice " of the circumstance of which Dundas and Wilson were afterwards informed, " that Mr Dunlop had been with Messrs M'Gregor and Murray at the time, " or recently before it was written. Messrs Dundas and Wilson, getting the " letter on the 21st, write their letter of that date, Saturday, in which they " mention, that, two days before, Mr Dunlop had spoken of arrestment " having been raised against him, and seemed to think it possible that it " might be for the purpose of arresting the fund in question, and asked for " an answer by Monday morning. But, on the same day after that letter " had been written and despatched, Mrs Dunlop came to Messrs Dundas and " Wilson, bringing a letter from Dunlop himself, dated the 20th May, the " words of which are quoted in Mr Wilson's letter of 24th May. From that " it appeared, that Mr Dunlop had been with Mr Murray, specially inquiring " whether there was an arrestment at the time when the letter of Messrs " M'Gregor and Murray, of the same date, the 20th, was dictated. It is not " surprising, that, on receiving this, Messrs Dundas and Wilson did not " hesitate to pay the money to Mrs Dunlop on the Saturday, without waiting " for an answer to their letter of that date, seeing that their only ground of " apprehension about an arrestment derived from Dunlop himself, was " removed by his letter, joined with that of Messrs M'Gregor and Murray, " written at the same time, and making no mention of such a thing. There " can be no doubt of their bona fides in so doing. But even in the strictest " legal view, there was really nothing before them to make them refuse " payment.

" Then the question is, Whether there was any negligence on the part of " Mr Smith, or of persons for whom he might be answerable at Glasgow, in " not warning Messrs Dundas and Wilson between the 19th and the 21st? " Though Mr Dunlop speaks of calling on Mr Smith on the 20th, this must " probably be understood to mean that he called at his counting-house,—for " it is not averred in the record that Mr Smith himself was then in Glasgow. " The question, therefore, is, Whether there was any neglect on the part of

LAIDLAW v. SMITH.

28th Oct. 1841.

Judgment of Court.

Court pronounced the following interlocutor: — "The "Lords having heard counsel and advised the cause, "adhere to the interlocutor of the Lord Ordinary sub- "mitted to review, and refuse the desire of the reclaim- "ing note, and decern; but find no additional expenses "due."

Laidlaw appealed from the interlocutors of the Lord Ordinary and the Court.

Appellant's Argument.

The Appellant.—The Lord Ordinary has made an extraordinary mistake in supposing that the civil and criminal consequences of breach of arrestment flow from

---

"other persons for whom he may be answerable? The members of his "family might, no doubt, have made the arrestment known to his clerks, or "his agents. But here the peculiarity comes in, that the matter had been "previously committed to Messrs Dundas and Wilson, and that this could "not naturally be known to the family, who might reasonably suppose that "Mr Smith would only have to keep the money after he saw the arrestment. "The matter is then reduced to this narrow point, Whether it must be held "that there is breach of arrestment, because Messrs M'Gregor and Murray "did not inquire at the dwelling-house whether there was any arrestment "before writing the letter of the 20th May? The Lord Ordinary thinks, "that there is in this something to raise a doubt, whether the legal presump- "tion of knowledge may not take effect. But, on the whole, he is inclined "to think, that a mere negative of this kind, on the part of agents, acting "perfectly in bona fide, and having no actual knowledge, is not sufficient to "infer so serious a responsibility against a debtor who had, long before the "arrestment, authorized the payment of the debt in another place.

"The Lord Ordinary is aware, that the pursuer has not exactly admitted "the fact averred by the defender, that he was absent from Glasgow on the "19th, 20th, and till the evening of the 21st May, and did not come to the "knowledge of the arrestment till this last time. If the pursuer had asked "an issue upon that question of fact, the Lord Ordinary would probably "have thought it necessary to grant it. But seeing that he has not specifi- "cally denied the averment, — which he might have known by inquiry, — "and has not averred the contrary, and that the cause was pleaded as a case "of law, without any demand for such an inquiry, the Lord Ordinary has "thought that there are sufficient data on which to decide it.

"The judgment on the first plea in law, renders it unnecessary to go into "the disputed matter regarding the debt of the arresting creditor.

"J. W. M."

the statute 1581. That statute did not introduce the law upon the subject; but was made to protect the law as it existed previously. King v. Dingwall, Mor. 785; Thesaurare v. Kyle, Ibid. The civil and the criminal consequences do not necessarily follow in every case. The one may take place without the other. The facts alone may be sufficient to produce the civil consequences, whereas an inquiry, as to the animus quo, may be necessary before the criminal consequences can ensue. Wardlaw v. Gray, Mor. 786.

It was the respondent's duty to leave such instructions at his house, as might ensure the transmission of papers on business to his place of business. He cannot be heard, therefore, to say he did not know of the arrestment, or that it was not known to those acting for him, when he did not take means to make it known. But proof of personal knowledge of the arrestment was never necessary in order to affect the arrestee with the consequences of breach of arrestment. Ersk. III. 6, 2, 11, and 14. Blackwood v. Sutherland, Mor. 1793.

[*Lord Chancellor.* — Parties in that case did not proceed on the idea that the arrestee was present, but absent. Here the party was in Scotland.]

The question there was, as to personal knowledge, and the consequences would have been the same if Lord Sutherland had been in Scotland. If the arrestment have been executed according to the mode prescribed by the statute, that is all that is required to protect the arrester, — hardship to the arrestee cannot interfere to stop enforcement of the rule of law. To hold that personal knowledge by the arrestee is necessary, would be to alter entirely the law of arrestment as it has been hitherto received.

[*Lord Chancellor.*—Your argument would go to hold

LAIDLAW v. SMITH. 26th Oct. 1841.

arrestment good in all the cases put by the Lord Ordinary. In these cases the arrestment is supposed to be before the payment, and unexceptionable.]

Appellant's Argument.

Ignorance is not enough to save the arrestee, not even bona fide ignorance, where knowledge might have been obtained. But even if proof of personal knowledge were necessary, Dundas and Wilson had intimation from Dunlop, so early as the 19th, of the probability of arrestment having been used; and inquiry had been made by Dunlop of M'Gregor and Murray on the 20th, as to the existence of any arrestment. Dundas and Wilson ought not to have been satisfied with the letter of Dunlop to his wife, but ought to have followed out the inquiry they had made of M'Gregor and Murray before paying; and M'Gregor and Murray, when Dunlop inquired of them, should have applied at Smith's house, or place of business. Dunlop had put both the agents of the respondent in a course of inquiry, and this was constructive notice to himself, — the omission of his agent was his omission.

[*Lord Chancellor.* — Is there any evidence where Smith was; or if those who were in charge of his house could have let the arrestment be known in time to stop payment?]

No.

Lord Advocate. — And the appellant did not ask any issue upon that point.

Lord Chancellor. —The appellant rests on the arrestment, and says it is for the respondent to make out a special case.

Respondent's Argument.

The Respondent. — The appellant's argument goes the length, that the mere fact of the arrestment having been regularly made, is sufficient to determine the

arrestee's liability to make good the fund arrested, notwithstanding he may have paid to the common debtor, subsequently to the arrestment, under any circumstances whatever. The impracticability of such a state of the law is sufficiently pointed out in the note of the Lord Ordinary, to shew that there may be circumstances, beyond the mere fact of arrestment regularly used, requiring consideration, before the liability of the arrestee to make second payment can be determined.

I. The principle let in by the consideration of these circumstances is the bona fides of the payment made by the arrestee. Bona fides is recognized throughout the law of Scotland in regard to other questions between debtor and creditor, and third parties. Ersk. III. 4. 3, and III. 5, 7; Stair, I. 18, 3; and again, Stair, III. 1, 13, and III. 10, 1; Ersk. V. 5, 3, et seq.; and is to be found even in the bankrupt act, 54 Geo. III. cap. 137, sec. 30 and 38, in regard to the effect of sequestration, which is a congeries of arrestment and other diligences. And it is not excluded from the case of simple arrestment, but expressly applied to it. Stair, III. 1. 40.

II. Besides, it is impossible to make the respondent liable through any other medium than his conviction of a legal delinquency or wrong. Breach of arrestment is the sole medium concludendi of the appellant's summons, and that is nomen juris for a punishable offence. Stair, I. 9, 29, and IV. 50, 30; Ersk. IV. 4, 36, and 22. The statute 1581, cap. 118, likewise deals with the matter, as involving malus animus. But how can a party be guilty of the offence, if in ignorance of the arrestment?

Erskine, III. 6. 14, the most favourable authority for

LAIDLAW v. SMITH. 26th Oct. 1841. Respondent's Argument.

the appellant, puts the doctrine he lays down upon something done "in contempt of the diligence," and the reason he gives is the consequence of "admitting pre-"tences of ignorance." But the respondent's defence is not a pretence or possibility of ignorance, but the actual and admitted fact of impossibility of knowledge, and how, then, can what was done be said to have been done in contempt of the diligence?

But any authority to be derived against the respondent from this passage in Erskine is done away by a unanimous decision of the Court subsequent to the publication of Mr Erskine's work. Scott v. Fluyder & Co. Mor. voce Arrestment, app. No. 1, in which the defence of bona fide payment by an arrestee, was distinctly recognized as relevant.

With regard to any thing done by the respondent's agents, there is not any averment on the record by the appellant, which could have entitled him to an issue, in regard to any laches by these parties, if he had asked for it. But the appellant neither put any statements on the record, nor asked any issue entitling him to go into any other question than the mere fact of arrestment, and payment subsequent to it; he allowed the facts to be taken as admitted according to the statement of the respondent, and the case to be treated as one purely of law.

Knight Bruce in Reply. — The onus is upon the respondent to make out a case justifying his payment. It is sufficient for the appellant to prove the regularity of his arrestment, and that the fund arrested was payable at the date of its being used. This was admitted by the respondent, and the matters in avoidance of his liability it lay upon the respondent to prove.

[*Lord Chancellor.* — Is it any part of your case that

Smith was not at home; that was not raised below, for the Lord Ordinary and the Court raise no question about the facts, and Mr Bruce opened on letters as ascertaining facts; no question was raised upon them till I asked how the facts were proved. Shew me on record these facts disputed.]

Respondent's Argument.

Onus not on appellant of admitting or of asking issue to displace averments. It was for other party.

Ld. Chancellor's Speech.

LORD COTTENHAM. — My Lords, The first, and for the reasons I shall presently give, the only question in my opinion in the present case, is as to the proposition of law raised by the first plea of the respondent, which may be shortly stated to be, whether the arrestee of a debt, paying it bona fide to the common debtor after a regular arrestment, but in ignorance of it, can be compelled to pay it over again to the arrester.

In considering this question, I shall assume the facts to be as stated by the Lord Ordinary. Independently of authority, the proposition that the arrestee is subject to such liability, would be one which it would be impossible to support upon principle. The law of Scotland allows the power of arrestment of property belonging to the debtor, for the benefit and security of the creditor, and it would be most unjust to enforce that right to the prejudice of others. To the arrestee who owes the debt, or possesses the property arrested, it must be matter of indifference to whom he pays or renders it. If the dealing between his creditor and another give to that other the right to recover the debt, the law, in carrying that right into effect, ought carefully to protect the person owing it. In other transfers of debt, and liabilities, it does so, and imposes no responsibility upon him to the person becoming entitled,

LAIDLAW v. SMITH. 26th Oct. 1841. Ld. Chancellor's Speech.

until he has distinct personal notice of such transfer. Many instances of this are mentioned in the respondent's case. What creates the liability in any case to pay the debt over again to a person originally a stranger to the party paying? Merely the having paid it to one person with knowledge that another was entitled to it, which amounts to this, that a payment male fide shall be considered as no payment at all. It was for the appellant to shew why this general principle of law and justice is not applicable to cases of arrestment. The statute of 1581 prescribes the mode of making arrestments, and following the directions of that act, the arrester is entitled to all the benefits of his arrestment, as against the property or debt in medio, that is, as against his debtor and other competitors, but there is nothing in that act making the prescribed service at the dwelling-house the ground, without more, of personal liability in the arrestee, who, in ignorance of the arrestment, pays the debt bona fide to his original creditor. The assignment of a debt gives to the assignee a title to the debt, but not to recover the amount from the debtor, who, without notice, has paid it bona fide to the assignor. If the arrestment give such right to the arrester, as against the arrestee, it must be by a positive rule of law, independent of the particular circumstances; and if so, it must operate in the cases put by the Lord Ordinary, in which no caution on the part of the debtor could possibly protect him. Such consequences may not prove what the law is, but in deciding between conflicting authorities, may be permitted to weigh powerfully against those from which they must flow.

If, then, this liability be inconsistent with this rule of law in other cases, and be not enacted by statute, and if it be contrary to the principles of justice, it can only be

LAIDLAW v. SMITH.

26th Oct. 1841.

Ld. Chancellor's Speech.

supported by the weight of legal and judicial authority. Only two cases have been referred to in which the question has been discussed, that of Blackwood, in 1703, and that of Fluyder, in 1770. It is true, that the first is mentioned by Mr Erskine, book 3, title 6, section 14, and apparently with approbation, but the latter case was decided after Mr Erskine's death, in 1768, though before the first publication of his work, in 1788. It does not appear how the case of the offence referred to by Mr Erskine in the same passage could have arisen, as neither the arrestee nor the property were within the jurisdiction. It appears to me, however, that Blackwood's case is a very distinct authority in favour of the appellant's proposition, but it is of an old date, and does not appear to have been followed, for nothing can be more explicit than the opinion of all the judges who decided the case of Scott v. Fluyder, on the 8th of March, 1770.

The appellant attempts to get rid of the weight of this case, by stating that the arrestment against Tait was clearly void, but all the judges concurred in considering it as regular and valid, but that it had ceased to have any operation by his bona fide payment before he had notice of the arrestment. This, then, is a much later decision than that of Blackwood, and is in conformity with the rule of law in all similar cases, and is consistent with the principles of justice, which the former decision was not. I cannot therefore hesitate to approve of the judgment of the Judges of the Court of Session, who preferred adhering to this decision, rather than to re-establish the rule as laid down in Blackwood's case.

It was, however, argued, that the facts of this case, as stated by the Lord Ordinary, did not raise this question, because, although Smith had no personal notice of the

LAIDLAW v. SMITH.

26th Oct. 1841.

Ld. Chancellor's Speech.

arrestment, his agents, Mr Wilson and Mr Murray had, and that all were guilty of so much negligence, that notice of the arrestment ought to be assumed, or rather, that Smith ought not to be at liberty to say that he had not notice. So far as affects Smith personally, the alleged negligence is the having left home without appointing some person to act for him in the event of an arrestment being served in his absence. There is no attempt to shew that his absence was from any improper motive with respect to the arrester, or that he had any reason to expect that there would be any arrestment. The proposition, therefore, is, that every person owing money to another is bound, under the penalty of personal liability, before he leaves his own house, to appoint some person who, in his absence, may deal with any arrestment of the debt which may be served. The general operation of this proposition would be alarming, when it is recollected how large a proportion of the inhabitants of Scotland must necessarily be liable to debts and obligations to others, none of whom, according to the proposition of the appellant, could safely, or without being guilty of a neglect of duty, leave their houses for any length of time whatever, without appointing an agent, and leaving orders to provide against the possible event of some arrestment of such debt or obligation being served during his absence.

But it was said that Wilson, the agent at Edinburgh, and Murray, the agent at Glasgow, had sufficient intimation of the arrestment, to make the payment of the debt on Monday the 21st an act of negligence, which ought to subject the principal, Smith, to this liability. To this the short but decisive answer is, that Wilson and Murray were not Smith's agents for this purpose. Wilson's authority was only to settle the amount of

Dunlop's debt, and to pay the sum agreed upon, which had been remitted to him for that purpose. If the money in Wilson's hands was not to be treated as still in the hands of Smith, then at the time of the arrestment the property was no longer in medio, and if it was to be so considered, then the agency of Wilson cannot be extended beyond the real nature and object of his employment, and notice to him of the arrestment would not be of any effect to subject Smith to responsibility. If, indeed, he had had any such notice, which he had not, he would properly have suspended the execution of his orders till he had communicated with Smith, but his not doing so would not have affected him. Such is the recognized rule of law in this country respecting principal and agent, and which the security of mankind requires; and the case of Campbell, referred to in Erskine, book 3, title 6, section 4, edition by Mr Ivory, and note 310 to section 14, proves that the same rule prevails in the law of Scotland, and is applicable to this particular subject of arrestment.

I therefore think that the judgment of the Court of Session upon the proposition of law raised by the plea of the respondent is correct. The principal difficulty I have had in this case is as to the facts, for although there seems to be no reason for doubting that the facts, as collected and stated by the Lord Ordinary, are the real facts of the case, I cannot find in the proceedings any admission that they are so; and it is in my opinion so essential to the due administration of justice, and so important to the science of the law, that the facts of a case should be clearly ascertained, by either admission or proof, before the rule of law is applied, that I have been anxious to discover, if possible, some judicial ground for assuming that the facts are as stated by the

LAIDLAW v. SMITH. 26th Oct. 1841. Ld. Chancellor's Speech.

Lord Ordinary, and I was for some time disposed to advise your Lordships to send the case back to the Court of Session for that purpose; but looking to the provisions of the 6th George IV., chapter 120, and particularly the 14th section upon this subject, and the manner in which the appellant brought his case before the Inner House, in which I do not find any complaint made of the Lord Ordinary having proceeded to adjudicate upon the merits without a proper previous ascertainment of the facts, and that it formed no part of his application there, that directions might be given for that purpose, I think that the appellant cannot now object to the interlocutor upon that ground. I must assume that all parties were aware of what the facts really were, and were desirous of having the opinion of the Court upon an admitted state of facts. I therefore propose to your Lordships to affirm the interlocutors appealed from with costs.

Judgment.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

DEANS and DUNLOP — RICHARDSON and CONNELL, Agents.

[Heard, *July* 21, 1840. — Judgment, *Oct.* 6, 1841.]

WILLIAM ALLAN, Esq. of Glen, Appellant, (No. 20.)

[*Attorney-General — Pemberton.*]

PETER M'CRAW, Collector of the Assessment for the support of the Poor of the Parish of South Leith, and J. C. BEADIE and others, a committee of the Heritors of the Parish, Respondents.

[*Lord Advocate — Knight Bruce.*]

Statute. — Construction of.

2d DIVISION.

Lord Ordinary Jeffrey.

Statement.

IN 1756, Grant obtained from George Heriot's Hospital, a feu charter of lands in the vicinity of Edinburgh, containing a proviso, that in case the royalty of the city should be extended, so as to embrace the lands feued, he, "or the proprietors of the ground for the "time, should not only be obliged to build according "to a fixed plan, but likewise the houses to be built "thereon shall be subject and liable to pay the same "public burdens, as the other inhabitants of the city "are subject and liable to pay."

In 1767, the 7 Geo. III. cap. 27, was passed. That act recited among other things, that "the extending the "limits of the city of Edinburgh had been found neces-"sary, as well for the benefit of trade and commerce, "as for the conveniency and health of the inhabitants:" that the grounds in the act mentioned, were without the royalty of the city; and it was just and reasonable that

ALLAN
v.
M'CRAW
and others.

6th Oct. 1841.

Statement.

the royalty should be extended over those grounds, in consideration of the great expense the city had been, and would be put to, and that the proprietors of the several parcels of ground after mentioned have either consented, or are bound by their titles to consent, that their respective lands shall be included within the royalty of the city. Upon this recital, it was enacted, that after the 29th of June, 1767, the royalty of the city should be extended over and comprehend certain lands specifically enumerated, including those feued to Grant, and described as feued from George Heriot's Hospital, and being lands "which have "been feued by the Governors of George Heriot's "Hospital, to the several persons after mentioned, "under an express condition and covenant, that in case "the royalty of the city of Edinburgh should at any "time thereafter be extended, so as to comprehend "their grounds, they, their heirs and assigns, or the "proprietors of the said grounds for the time, should "not only be subjected to build such houses as they "shall build thereon, agreeably to the plan to be con-"certed by the Town Council of Edinburgh, and other "managers for the time: but likewise the said houses "to be built thereon, shall be subject and liable to pay "the same public burdens as the other inhabitants of "the city are subject and liable to pay." The same clause then went on to enact, that the "said Magistrates "and Town Council, from and after the said 24th day "of June, in the year of our Lord 1767, shall have, "and enjoy the same rights, privileges, and jurisdictions "over the said grounds hereby annexed to, and com-"prehended in the said royalty, as they do now enjoy "and exercise over and within the limits of the present "royalty, by any law, statute, or established custom,

" and shall, and they are hereby empowered to levy the " same maills, duties, customs, and other taxations, " within these annexed grounds, in the same manner, " and by such actions at law as the said Magistrates " and Town Council are entitled to use, by any law, " statute, or otherwise, within the present royalty, for " recovery of such maills, duties, customs, and taxations " as aforesaid."

By the second section, after reciting, that " 'seve- " 'ral parcels of the lands feued out as aforesaid, by " 'the Governors of George Heriot's Hospital, and " 'comprehended within the said royalty, were granted " 'by the said Governors, and acquired by the pur- " 'chasers for the purpose of building thereupon country " 'houses and offices, with gardens and enclosures " 'adjoining; and it being reasonable that the parcels " 'so granted shall not be subjected to the city burdens " 'and taxations, so long as they shall continue to be " 'used and occupied in the manner, and for the pur- " 'poses originally granted;' be it therefore enacted, by " the authority aforesaid, that nothing in this act con- " tained shall be understood to subject to the said city " burdens and taxations, any country house or offices, " built or to be built on such parcels of land as afore- " said, in any case where the owner of such country " house is possessed in property of at least three acres " of ground, adjoining to such country house and " offices, including the areas of the same, and on which " there shall be no other buildings except the country " house and offices aforesaid."

By the 10th section it was enacted, " that the said " Magistrates and Town Council of the city of Edin- " burgh shall have full power to appoint stent-masters " to levy from the proprietors and possessors of all such

ALLAN v. M'CRAW and others. — 6th Oct. 1841. — Statement.

" houses as are built, or shall hereafter be built, upon " the foresaid grounds, hereby annexed to, and compre- " hended within, the said royalty, an equal portion of " the cess, annuity, poors-money, and watch-money, " payable by the city of Edinburgh, in the same way " and manner as the same are now levied within the " present royalty."

By the 12th section it was enacted, " That the seve- " ral lands hereby annexed to the royalty of the city of " Edinburgh shall, besides the cess to be levied by the " collector of the town, for and in respect of the houses " and buildings, remain liable and be subjected to the " payment of a rateable proportion of the cess and land- " tax, and other public taxes imposed, or to be imposed, " on the shire of Edinburgh, for and in respect of the " ground, to be levied in the same manner as formerly, " any thing in this act to the contrary notwith- " standing."

By the 15th section it was enacted, " That the afore- " said grounds hereby annexed to, and comprehended " within, the royalty of the city of Edinburgh, shall be, " and they are hereby for ever after disjoined from the " parish of Saint Cuthberts or West Kirk, and South " Leith, and are hereby annexed to the parish of Saint " Giles within the city of Edinburgh.

And by the 16th section it was provided, " That the " lands hereby disjoined from the parishes of Saint " Cuthberts and South Leith, and the heritors thereof, " shall remain liable and be subjected to the ministers' " stipends and other parochial burdens; and that the " tythes payable out of the lands hereby annexed shall " be, and the same are hereby saved and reserved to the " true owners thereof, in the same manner as if this act " had never passed."

The father of the appellant acquired the lands feued to Grant, while there was yet but a mansion-house upon them, and pleasure grounds surrounding it. He possessed the lands in this condition until the year 1823. In that year he began to feu out the lands for building, and laid out large sums of money in preparing the lands by common shores and otherwise for this purpose.

From time immemorial, the Parish of South Leith, within which Grant's lands were situated, until they were disjoined by the 7 Geo. III., had been in use to levy an assessment for the poor, in respect of these lands, and the assessment was paid by Allan, Grant, and their predecessors, until the year 1830, in which year the Magistrates of Edinburgh exercised the powers of the statute, by having the boundaries of the lands ascertained by the Sheriff, and declared to be within the royalty of the city. From this time Allan refused to pay the assessment, on the ground, that an assessment for the poor had also been made by the city of Edinburgh, and that he was liable to the city, and to it alone. By this time the land had been nearly covered with houses.

In these circumstances, the respondents brought an action against Allan, concluding to have it declared, that they had a good right to assess the houses built on Allan's ground, for the support of the poor, and that Allan should be decerned to pay the half of the assessment falling upon him, as proprietor, from the year 1830, to the date of the action — the other half being payable by the occupiers of the houses.

Allan pleaded in defence, — I. That his property could only be liable for one rate, it being contrary to law, as well as to a true construction of the statute, to assess the same property twice for the same tax.

ALLAN v. M'CRAW and others.

6th Oct. 1841.

Statement.

II. At least, according to the true construction of the statute, he was liable in poors'-rate to the parish of South Leith only for the solum, but not for the houses, which were rateable by the city of Edinburgh.

The Lord Ordinary, (15th November, 1838,) on advising cases for the parties, repelled the defences, and declared and decerned in terms of the libel, and issued at the same time the following note.[1]

The appellant reclaimed to the Inner House, but his

---

[1] "*Note.*— It is supposed that there can be no doubt that the clause in "the Act of 7 George III. c. 27, by which it is enacted that the lands "thereby disjoined from the parish of South Leith and the heritors thereof, "shall notwithstanding 'remain liable for ministers' stipend and other "'parochial burdens, in the same manner as if this act had never passed,' "means that they were to remain so liable to the parish of South Leith, and "as poors'-rates are certainly parochial burdens, it necessarily follows that the "defender is liable in some payment of poors' money to the pursuer. His "attempt to make out that this liability is only to the parish of St Giles, is "too extravagant to require any observation.

"It is equally certain, and does not seem, indeed, to be disputed, that he "must also pay, not only cess, annuity, and watch-money, but poors' money "for his annexed property, to the Edinburgh collector; and it necessarily "follows, therefore, that this property is liable to some extent to a double "assessment, or to contribute to the poors' funds in two separate parishes, "though finally disjoined from one, and annexed quoad omnia to the other.

"The defender, however, makes an anxious, and no doubt a very ingenious, "attempt to escape from the consequences that appear at first sight to flow "naturally from these premises. Founding upon certain alleged peculiarities "in the phraseology of the statute, he contends that it does not import a "double liability for poors'-money to the two parishes, but only a division of "his original liability between them; and admitting that he must now be "assessed (as he was always) both for his houses and the ground on which "they stand, he maintains that Edinburgh is only entitled to the assessment "due for the houses, and Leith to that for the solum on which they are "erected. The Lord Ordinary is sorry that he cannot give his sanction to "this elaborate hypothesis, and is afraid that there is nothing but the great "hardship of the case that could entitle it to a serious consideration.

"In the first place, such a partition or distribution of an assessment for the "poor, it is believed, was never before heard of, and if it was really intended "to be introduced by this statute, such an intention must have been very "clearly and unequivocally declared and asserted. Cases may no doubt "have occurred, where a house was exempted from assessment, while the "area or solum was liable, or vice versa. But where both are confessedly "liable, it is not to be imagined, without the most express and precise

reclaiming note was refused on 15th February, 1839, in these terms:—"The Lords having heard counsel "for the parties, and advised the cause, adhere to the "interlocutor of the Lord Ordinary submitted to re-

---

"declaration to that effect, that the assessment should ever be divided and "one part of it given to one parish, and the other to another. It may be "said to be as unprecedented, that one and the same property should in any "shape be made liable to assessments in two parishes, and it probably is so. "But the difference is, that there are clear and unequivocal words in the "statute, putting the fact of their being a double assessment beyond all "question; while there is nothing, either in its general policy and structure, "or in its particular expressions, to countenance the notion of such a partition "as is here suggested, except upon strained analogies, or fine drawn verbal "constructions.

"In the first place, the general policy of the act is undeniably to subject "those annexed lands contrary to the common rules of law, and apparently to "common equity, in the extraordinary burden of double assessments in rela- "tion to a variety of other charges, besides that of a provision for the poor, "and in all those others, it is plain there is no room for holding that there "was merely a splitting of the original burden, it being manifest, beyond "contradiction, that the whole of the original burden to the old parish or "county, is retained undiminished, and that of the city charges imposed, in "addition.

"Thus, to take the payment of cess, it cannot be denied that the defender "must continue to pay to the county collector the whole amount for which "he was chargeable for the properties in question before their annexation, and "over and above the same proportion of the city cess as he would have had "to pay if the property had always been within the royalty. In short, he "pays a full double assessment without relief or partition of any kind. That "the county cess is said to be charged for the land, and the city for the "houses, is plainly a matter of no consequence, if the result be as has now "been stated, and is in fact a mere verbal peculiarity, admitting of an easy "explanation. He pays the county cess according to his valuation in the "cess-books, which, though popularly said to be a valuation of the lands "belonging to him, did undoubtedly proceed upon an estimate of the true "worth and value of the houses and buildings on the lands at the time, as "well as of the lands themselves. The city cess, on the other hand, was "originally imposed as the land tax of the ground, as well as the buildings "constituting the original royalty, and although it is now levied from, or "constituted by, the owners or occupiers of houses, this is merely an arrange- "ment adopted for the sake of convenience, and to enable the burgesses, or "corporation at large, (who are the proper debtors,) to raise, in fair propor- "tions, the sum due for the solum of the royalty, with all that may be built "upon it, and the same end would have been attained, which was in view "when it was said that the defender's city cess should be paid in respect of "the houses belonging to him, if it had been merely declared (as it is declared "in the charter) that the cess due for his annexed property should be levied

ALLAN v. M'CRAW and others. — 6th Oct. 1841. — Statement.

" view; refuse the desire of the reclaiming note, and " decern; find additional expenses due, allow an account " to be given in, and remit the same, when lodged, to " the auditor to tax, and report."

" in the same way with all the other cess within the royalty. It is also to " be observed, that though the cess is said to be levied according to the esti- " mated rental of the houses, there is no doubt that this includes also the " estimated rental or value of the areas on which they stand, or which may " be possessed along with them. The owner of a house is always the owner " of the area also, (for one who builds a house on ground held on lease, will " be only a tenant of the house also,) and undoubtedly the additional value " (or rent) which a house acquires, by occupying a large area, or even by " having a sunk area or garden beyond the walls, is always taken into view " in fixing the proportion in which it shall be assessed for the city cess.

" The case is, in all respects, the same as the rogue-money and road- " money, which the defender must continue to pay to the county without " abatement, for his annexed property, and the assessments for watching and " paving, which he must also pay, over and above, for similar objects within " the city. There is no partition here of the original charge, but a clear " duplication of them, exactly as objectionable, in point of principle, as the " double assessment for the poor.

" And, finally, there is the same duplication, without division or relief, of " what he must pay for the support of the clergyman in the two parishes. " He must continue to pay stipend (and additional stipend on every new " augmentation) to the minister of South Leith, exactly as if his property " had not been annexed to the royalty, and he must also pay, over and above, " his full proportion of the annuity tax for the clergy of the city, exactly as " if he had never been liable for any thing beyond it. The whole analogy " and scope of the act, therefore, is in favour of the construction, if it were " otherwise doubtful, upon the words which would subject him to a similar " duplication as to the assessments for the poor.

" But it does not appear to the Lord Ordinary that the construction is " doubtful on the words; and, on the contrary, he thinks there are expres- " sions in both the leading clauses on which the question depends, which " entirely exclude that suggested by the defender.

" Take first the clauses containing the defender's liability to South Leith, " which is more immediately the ruling clause in the present question. It " is there enacted, that notwithstanding the disjunction of his property from " that parish, and its annexation pro toto to another, he shall yet 'remain " 'liable and be subjected to parochial burdens, in the same manner as if this " 'act had never passed.' Now, in what manner was he liable to poor-assess- " ments in South Leith before the passing of the act? Was it only for the " naked solum which belonged to him within the parish, or for the complex " value of the solum, and all that was built or expended upon it, with the " effect of increasing its rental or value? It is supposed there can be no " doubt that it was for the last. Upon principle, the assessment should " always be according to the real rent, and it is to be made upon every heri-

The Appellant. — Property can be liable but to one parish in assessment for the poor; that is the general law, Dunlop's Paroch. Law, p. 230, Hill v. M'Craw, F. C. 44—to make it liable to two parishes, will require ex-

---

" table subject capable of yielding rent, — half upon the owner and half on " the occupant, the whole falling at last and substantially on the owner. The " defender, therefore, paid poor money to South Leith before the annexation, " not merely for this ground, but for the houses that stood on it; and if all " additional houses since built, had been so built without any such annexa- " tion, he would have been liable for an additional assessment in this his " original parish, in proportion to their value. But if the act has distinctly " provided, that he shall continue to pay exactly as if there had been no " annexation, how can he now propose to withdraw the value of those houses " (and, indeed, of all the houses previously existing on the lands, for there can " be no distinction,) from the claims of the present pursuer. To say that, " but for the annexation, there would have been no such houses, is but a sur- " mise in fact, or a suggestion in equity, and no ground for defeating the " clear words of a statute. But even in equity, it is a suggestion of very " little weight, since it is plain enough that the close proximity of the lands " to the original royalty, and the rapid increase of the town, would have pro- " duced just as much building in that quarter, although there had been no " annexation, or more indeed, if the poor-rates had any thing to do with the " matter, as they would then have been liable but to a single, instead of a " double burden. It is plainly impossible, therefore, now for the first time, " to restrict the Leith assessments to the naked solum, without entirely dis- " regarding the plain words of the statute, which declare that it shall be " continued in the same manner as if the act making the annexation had " never passed.

" What has now been said is enough to settle this question, since it is the " claim of the Leith collector only that is now to be disposed of. But the " words of the leading clause subjecting the annexed property to the Edin- " burgh assessment, are at least as strong and unequivocal. They provide " that the stent-master and collectors shall 'levy from the proprietors and " 'possessors of all such houses as are now built, or shall hereafter be built " 'on the annexed property, an equal proportion of the poors'-money, &c., " 'payable by the rest of the city of Edinburgh, in the same way and manner " 'as the same are now levied within the present royalty,' and by the terms " of the original charter to the author of the defender, engrossed and repeated " in the statute, it is provided that all such houses (that is, the owners and " possessors of such houses) shall be liable to 'pay the said burdens and tax- " 'ations which the other inhabitants of the city are liable to pay.' Now, " though it appears that lands within the royalty, if not occupied with houses, " or let as pertinents along with a house, are not subject to assessment in " this city, it is believed that it was never before surmised that the value or " rent of the ground on which the houses actually stand, was deducted from " the estimated rentals, according to which this assessment is imposed. The " fair annual value of the house, including its site and pertinents, is estimated

ALLAN v. M'CRAW and others. 6th Oct. 1841. Appellant's Argument.

press enactment. The 10th section gives power to the magistrates and council of Edinburgh to levy certain rates from the annexed lands, among which "poors'-money," is enumerated. This plainly gives the right of assessment to the city. On the other hand, the 16th section,

---

" by the stent-masters, merely as a criterion of the means and substance of " the owner or inhabitant, and in this view, the idea of distinguishing " between the fair value or rent of the house itself, and the plot on which it " stands, and of deducting the one from the other, must appear altogether " absurd and preposterous. No such thing, most assuredly, is ever thought " of in practice, either when a tenant agrees to pay an actual rent, or a stent-" master to settle a fair value. In truth, as already observed, no man can, " strictly speaking, be the proprietor of a whole house, who is not also the " proprietor of the ground it covers. And as this act expressly subjects both " proprietors and occupants to poor-assessments, (however they may be levied " in practice,) it would seem impossible to distinguish between his proprietor-" ship of the ground and of the house which is built on it, while the condition " of the tenant or occupant would be equally inextricable. Those who occupy " the house must necessarily occupy the site of the house, and it can by no " possibility have any other occupant. Though the fact be so, however, they " are said, in common parlance, to be the owners and occupiers of a house " only, and the provisions of the statute are merely accommodated to this " mode of speaking. The question is indeed of little practical interest to " Edinburgh, since their collector can desire nothing more than that he should " be allowed to assess the owners and occupants in the extended royalty, 'in " 'the same way and manner' in which he assesses those in the old royalty. " But it appears to be quite plain that he cannot do this if he allows any " deduction to be made from the estimated or stented value of the houses and " sites actually occupied in the former, which unquestionably is not allowed " in the latter.

" The case would certainly be a hard one for the defender, if he could be " conceived not to have been aware of the meaning and effect of the contract " into which his author entered by accepting of his feu-charter, and consenting " to the statute in question. But it does not appear how he could have failed " to be aware of this, and volenti non fit injuria. He has cause certainly to " regret that he did not take the opportunity afforded by the proceeding in " 1809, to come to some such arrangement as was made by the statute of " that year with the heritors in a similar situation in the pariah of St Cuth-" berts, the benefit of which the magistrates could scarcely have refused upon " equal terms, to him and the other annexed heritors of South Leith. The " necessity of the interposition of Parliament, however, in order to get such " an arrangement, goes strongly to confirm the decision which has now been " given as to those who are not within its advantage, as does also the late " judgment in the case of Burns against the Magistrates of Glasgow, in 1837. " But upon the merits of the case itself the Lord Ordinary has no serious " doubt. Expenses, it is thought, can scarcely be refused to a successful " collector of poors'-money. F. J."

while it declares that the lands disjoined from South Leith, and the heritors thereof, shall remain liable to "minister's stipend and other parochial burdens," contains nothing express as to "poors'-money," — all that can be relied on then is an inference from the words "parochial burdens." Inference, however, will not do; and even if it could, though poors'-money be a "parochial burden," the expression is preceded by the words "minister's stipend and other," plainly shewing, that by parochial burden was meant other burdens, ejusdem generis, with minister's stipend, such as repairs of the church, and of the manse, schoolmaster's salary, and the like. Moreover, these are burdens on the land, while poors'-rate is personal in respect of occupancy; and, accordingly, the 16th section makes the "lands" of the "heritors" continue liable for them, while the 10th section gives the right of assessment from "the "proprietors or possessors" of houses. But farther, the 16th section does not declare that the lands and heritors shall remain liable to the "parish of South "Leith." The liability is left quite general as to whose benefit it is to be for, and the meaning plainly was in reference to the lands spoken of, in the section of which, those in question formed a part. By that 2d section, the lands used as country residences were to be exempt from city burdens while so used; and the 16th section was intended to declare, that this exemption should not extend to minister's stipend and other parochial burdens proper upon lands used in this way.

II. But, at all events, if the city and the parish of South Leith are both entitled to make an assessment, that by the city must, under the terms of the 10th section, be in respect of the houses, and that by the

ALLAN
v.
M'CRAW
and others.

6th Oct. 1841.

Appellant's Argument.

parish of South Leith can, under the terms of the 16th section, be only in respect of the solum, without regard to the increased value by reason of the houses. This is evident from the terms of the sections themselves, from the language used in other statutes, when both land and houses are mentioned, such as 25 Geo. III. cap. 28, section 53; 31 Geo. III. cap. 57, section 9, the language in the two being different — that in the one being applicable to persons in respect of their occupation of houses, and that in the other being applicable to lands; for minister's stipend is payable out of the teind, which is a charge upon land only. This is evident farthermore from the terms of the 12th section, where the distinction between land and houses is obviously pointed out, and by the terms of 25 Geo. III. cap. 28, section 53; 31 Geo. III. cap. 57, section 9. Any other construction of section 16 would be impracticable, as the poor's-rate is leviable one half from the proprietor, and the other from the actual occupant or inhabitant; but the tenants, when charged for their proportion, which has not yet been done, have the ready answer, that they are not inhabitants of the parish of South Leith, but by the 37 Geo. III. have become inhabitants of St Giles', in the city of Edinburgh. This distinction between a rate upon the solum, and upon the houses built upon it, is not novel, but has been recognized in Bruce, 28th November, 1810, 16 F. C. 54; Commissioners of Barracks v. Milroy, 21st November, 1815, 19 F. C. 28; and Officers of Ordnance, 14th June, 1825, 4 S. 89; Rox v. St Mary Leicester, 6 M. and S. 400; Rox v. Regent's Canal, 6 B. and C. 720; Sprot v. Heriot's Hospital, 7 S. and D. 682.

The Respondents. — I. "Annuity," not teinds, is

Respondent's Argument.

the fund out of which the clergy of Edinburgh are paid; and that a double assessment was intended by the 10th and 16th sections in regard to poors'-rate, is apparent not only from the terms of the sections themselves, but from the circumstance, that a liability for "annuity" is declared by the 10th, and for "minister's stipend" by the 16th, making a double assessment in this case beyond cavil. As to any allegation of hardship, it cannot enter into the consideration of the case; and if it could, it is answered by the circumstance, that the liability to Edinburgh is part of the contract under which the appellant bought his land, and that exemption from liability to South Leith was no part of that contract.

II. By the terms of the 16th section, the appellant is to remain liable for parochial burdens, as if the act had never passed. And in the parish of South Leith, which is a landward parish, previous to, and since the statute, no distinction has ever been made between the value of a house, and of the ground on which it stands. The assessment is laid on the real rent, is paid one half by landlord, and the other half by tenant; whereas, in Edinburgh, as in all burghs, the assessment is made upon the house, and demanded from the actual occupant, without regard to proprietorship or tenancy, and this will sufficiently account for the difference of phraseology between sections 10 and 16.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, I think the interlocutors appealed from in this case, ought to be affirmed. The question is, Whether the lands of the appellant are liable to the payment of the poor-rate to the parish of South Leith, which depends altogether upon the construction of the act of 7 George 3. cap. 27, under which

ALLAN v. M'CRAW and others. — 6th Oct. 1841. — Ld. Chancellor's Speech.

they have been taken within the royalty of the city of Edinburgh. The lands were situate within the parish of South Leith, and by section 10, all houses built, and to be built, upon the lands in question, are made subject to an equal portion of the cess, annuity, poor-money, and watch money payable by the city of Edinburgh, as the same was then levied within the then royalty. By section 12, the land, besides the cess to be levied by the collector of the town, for, and in respect of the houses and buildings, is to remain liable and be subjected to a rateable proportion of the cess and land tax, and other public taxes imposed, or to be imposed, on the shire of Edinburgh, for, or in respect of the ground, to be levied in the same manner as formerly. By section 15, the lands are declared to be, and are for ever after, disjoined from the parish of South Leith, and are thereby annexed to the parish of St Giles' within the city of Edinburgh, and by section 16, it is declared, that the lands thereby disjoined from the parish of South Leith, and the heritors thereof, shall remain liable and shall be subjected to the minister's stipends and other parochial burdens, and that the tithes payable out of the lands thereby annexed, shall be, and the same are thereby, saved and reserved to the true owners thereof, in the same manner as if the act had never passed, and by section 18, all rights and interests, (other than the extension of the royalty,) of all person, or persons, which they had, have, or may have, in the lands thereby annexed are saved. So that the lands in question are disjoined from South Leith by one section, which, if there had been no other provision, would have exempted them from the liability to pay poor-money to the parish; but by another section, they are to remain liable to the parochial burdens of South Leith, as if the act had never passed. If,

therefore, the poor-money be a parochial burden, and if the property in question would have been liable to such poor-money if that act had never passed, the case comes within the very terms of the act.

It was argued, that the poor-rate is not a parochial burden. It is a rate to be paid by the heritors or owners, and by the occupiers of lands within the parish. It is therefore parochial, and that it is a burden, will not be disputed; and the 16th section accurately describes it as a parochial burden, to which the lands and the heritors thereof, were, before the passing of the act, liable, and were to remain so, after it had passed.

If the act had never passed, the lands in question, and any houses built upon them, would have been liable to this rate. If the same lands, and the houses built upon them, are not now liable to it, how is the provision of the act carried out, which declares, that the lands shall remain liable to it in the same manner as if the act had never passed?

The argument, however, that though the land may be liable, the houses are not so, does not require this comment upon the terms of the act to refute it. A distinct parliamentary enactment might, no doubt, subject the land upon which a house is built, and the house itself, to different rules and liabilities. But, in this case, there is no such distinct parliamentary enactment, and the general rule of law must therefore prevail, which considers the house as an accretion to, and as part of, the land on which it is built. This appears to me to be so clearly the true construction of the act, that I cannot but think that the question would not have been raised, had it not been for the case of M'Craw v. Cunningham, reported in 2d Shaw and M'Lean, 773, upon which there was a great difference of opinion. The

ALLAN v. M'CRAW and others. — 6th Oct. 1841. — Ld. Chancellor's Speech.

question in that case did not turn upon the same act of parliament as the present, but upon an act of 54th George III. chapter 170, under which the lands there in question were included in the royalty of the city of Edinburgh. It is true that the act declared, that the extension of the royalty over the lands there in question, was made under all the clauses, provisions, declarations, exemptions, and reservations, in favour of his Majesty and others, which are specified and contained in the act of 7th George III. Whether that decision was right, as to the extent to which the latter act incorporated the provisions of the former, is not material; because it was assumed, and, indeed, the decision proceeded upon that ground, that the provisions of the act of 7th George III. as to disjoining the lands from South Leith, and holding them nevertheless liable to the parochial burdens of that parish, did not apply to the lands taken into the royalty under the 54th George III.; and in deciding that case, the Judges of the Court of Session assumed, that if the case had been under the 7th of George III. the lands would have been clearly liable to the parochial burdens of South Leith; and I do not find any thing in the speech of the noble and learned Lord, who moved the judgment of this House, throwing any doubt upon that proposition.

The case of Burns v. Ewen and the Magistrates of Glasgow, is also inapplicable to the present. That case arose under another act of parliament, which separated the lands there in question, from the parish of which they had formed part; but there was no provision as to their remaining liable to the parochial burdens of that parish. The question was, whether such liability was to be inferred from a clause compelling the city of Glasgow to relieve the occupiers of poor-rates, payable by

them, as having been part of the parish before the passing of the act. The holding that, under such circumstances, the liability continued, would be a strong authority in favour of the respondent in the present case; but the holding that it did not, would be no authority in favour of the appellant, who has not an inference to contend with, to be deduced from other provisions of the act, but a positive enactment, as to the construction of which I do not see any room for doubt. I am therefore of opinion that the interlocutors appealed from are correct, and I move your Lordships to affirm them with costs.

Judgment of Court.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

ARCHD. GRAHAM — SPOTTISWOOD and ROBERTSON, Agents.

[Heard, 23*d July*, 1840. — Judgment, 6*th Oct.* 1841.]

(No. 21.) ROBERT HILL and others, Appellants.

[*Lord Advocate — Knight Bruce.*]

WILLIAM PAUL and another, Respondents.

[*Attorney-General.*]

Deed. — Under a general conveyance in trust for creditors, of all "means and estate presently belonging to me," with clauses suited to such a conveyance, *held*, that the future fees of a public office enjoyed by the granter, which was not in any way alluded to in the deed, were not carried by it.

Id. — A clause in a conveyance in trust for creditors binding the granter to execute such "farther deeds as may "be judged necessary for more effectually carrying the "purposes of the present trust into full execution," is for farther assurance only of that which is *de facto* conveyed, and will not oblige the granter to execute a farther conveyance of other estate.

Pactum Illicitum. — Public Officer. — Semble, That an assignment by a keeper of a register of sasines, of the fees of his office in trust for his creditors, would be illegal.

2d DIVISION.
Lord Ordinary Jeffrey.
Statement.

IN the year 1792, Hill was appointed keeper of the register of sasines for the county of Renfrew, &c. in conjunction with Fotheringham, with reversion to the longest liver. The proportion of emolument drawn from the office by Hill was, under a family arrangement, as alleged by him, payable to his mother for her life, and after her death to his unmarried sisters, so long as any

of them lived; a certain sum being deducted, "on "account of the expense, trouble, and responsibility of "recording, collecting fees, and other contingencies."

In 1830, Fotheringham died, and Hill became sole patentee of the office, but, as also alleged by Hill, on this event the proportion of fees became applicable to the same trusts as Hill's original share.

In March, 1835, the last of Hill's sisters died, his mother having died some time previously.

In the year 1826, Hill, having fallen into embarrassed circumstances, executed a deed on the 28th of October in that year, in favour of Paul, and M'Kersey deceased, as trustees for his creditors, under which Paul entered into possession.

Hill's name had all along appeared as keeper of the register in every almanac and county list, but whether Paul and the creditors were aware at the date of the trust-deed in 1826, that he held the office, did not appear.

In May, 1835, Hill opened a negotiation with Paul for a discharge by his creditors, and an allowance from the fees of his office was part of the consideration offered by him. This negotiation went off, and then Paul required Hill to account to him for the whole of the fees of the office, as falling under the trust-deed; this he did by letter written in July, 1835.

In August, 1835, Hill resigned the office, and a new patent was issued in favour of Graham and Hill's son, under reservation of an annuity of L.300 to Hill. The object of this was confessedly to secure the office to the son, by reason of Hill's infirm state of health.

In January, 1837, Paul brought an action to have it found that Hill was bound to account to him for the fees drawn by him from the death of his last sister, and

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

that Graham and Hill's son were bound to pay over to him the whole fees which they had theretofore drawn, or might receive during the life of Hill, with conclusions for accounting and payment upon the footing of these declarations.

The deed under which Paul brought this action conveyed, "heritably and irredeemably, all and sundry "superiorities, lands and heritages, debts heritable and "moveable, and whole goods, gear, sums of money, and "effects, and, in general, my whole means and estate, "heritable and moveable, of whatever nature or de-"nomination, or wherever situated, presently belonging "to me; and in particular, without prejudice to the "said generality, all and whole," here followed a particular enumeration of lands conveyed, "together with all "right, title, and interest, claim of right, property, and "posesssion, petitory and possessory, which I, my pre-"decessors or authors, had, have, or any ways may "have, claim, or pretend to the lands and other "heritages, and others, generally and particularly "above disponed, or to any part or portion thereof; "surrogating and substituting the said trustees in suc-"cession in my full power, right, and place of the "whole heritable and moveable estates and effects "above disponed and assigned, with full power to "uplift and discharge the rents and feu-duties of the "said lands and others for crop and year 1826, in so "far as the same are still outstanding, and all future "crops and years, and also all arrears of rents and feu-"duties, due for bygone crops and years, to intromit "with the personal estate hereby conveyed, compound, "transact, and agree, or enter into arbitration con-"cerning the said lands and estate, real and personal, "or any part thereof, and generally to do every other

" thing requisite and necessary for making the same " effectual, which I could have done before granting " hereof." The purposes of the trust were declared to be to the end that the trustees should " enter into the " immediate use and possession of my whole heritable " and moveable means and estate, above conveyed, with " power to sell and dispose of my said lands and others, " or such parts and portions thereof, as to the said " trustee acting for the time shall appear proper and " expedient, and that either by private sale, or public " voluntary roup, and in wholesale or in parcels, and " on such conditions, and at such prices, as the said " trustee acting for the time shall think fit, or as he " shall be directed to do in these particulars by the " majority of my creditors in value present at a meeting " to be called as before specified; as also with power to " the said trustee to sell and dispose of such parts of the " woods growing upon the said lands, as the said trustee " shall think proper, at such prices as can be obtained " for the same, either by public roup or private bargain, " and upon such previous advertisement as the said " trustee shall think necessary, with power to him to " receive payment of the prices of said lands, woods, " and others, or to take bond for the payment of the " same from the purchasers, with one or more cautioners " reputed responsible at the time, and with power to " the said trustee to make up and establish in my per- " son all necessary titles to the said lands and estates, " and for rendering effectual such sales, with power to " the said trustees to grant dispositions, discharges, and " other writings necessary, with all clauses needful, to " the purchasers of said lands and others, and that " simply so as that the purchaser shall be noways con- " cerned with the application of the price thereof, nor

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

"the said lands be burdened or affected with any of the "debts, conditions, or provisions herein contained; as "also with power to output and input tenants, and grant "tacks of the said lands, if necessary, for such periods "as may be consistent with the object of this trust, "which is the speedy payment of my debts; also with "power to the said William Paul, or other trustee "acting for the time, in so far as I, the said Robert "Hill, am concerned, but always with the previous "approbation and authority of the majority in value of a "general meeting of my creditors, to be called as after "specified, to compound, transact, or agree, submit, "and refer, any questions, disputes, and differences "which may arise betwixt them, and every other per-"son or persons, touching the execution of this trust-"right, or any other matter concerning the premises, "and particularly all claims and demands of whatever "nature, either competent to me, and now hereby "assigned, or which may be made against me or my "estate; which transactions and submissions, with the "decreets-arbitral, one or more, to follow thereon, are "hereby declared valid and effectual; as also, with full "power to the acting trustee to sue and insist in all "actions, and to do every act, matter, and thing, he "shall judge necessary or proper for effectually securing "my said creditors, and obtaining to them payment of "their debts: and the prices and produce of the lands "and other estates, real and personal, generally and "particularly above conveyed, with the accrescing "interest of the same, rents, maills, and duties of said "lands, are hereby directed to be applied by the said "William Paul, or other trustee acting for the time; "and by acceptation hereof, he shall be bound and "obliged to apply the same, in the first place, for the

" payment of public and parochial burdens, and other " charges that shall be necessary for the support of the " estates, lands, and others above disponed, and for the " charges and expenses of management in executing " this trust, as such charges and expenses shall be from " time to time ascertained by the said trustee, with a " suitable remuneration for his trouble."—In the second place, for payment of the granter's debts. " Declaring " always, that neither the tenants nor possessors of my " said lands, nor the purchasers of my said estate, real " or personal, from the trustee, shall be anywise con- " cerned with any of the conditions of this trust, or " accountable for the application and disposal of the " said rents, prices, and produce of my said lands and " effects, real or personal, but the simple discharge of " the said William Paul, or other trustee acting for the " time, or any other person properly empowered by " him, shall be a sufficient exoneration to the tenants " or purchasers, to all intents and purposes, under the " exception of prior securities, as before and after men- " tioned: And I hereby authorize and empower the " said William Paul, or other trustee acting for the " time, to name and appoint factors and overseers, " cashiers and agents, to act under him in the manage- " ment of my said estates, and in the sales of the said " lands and effects, and for recovering the rents, prices, " and produce thereof: And it is farther declared, that " notwithstanding the general powers before stated, " bestowed upon the trustee acting for the time, yet it " shall be in the power of the majority of my creditors " in value to give directions to the trustee of the time " and mode of disposing of my said heritable property, " and he, the trustee, shall be obliged to follow such " directions: And it is farther provided, that in case

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

" the trustee or trustees above named in succession, " shall not have sold and disposed of the lands and " others above conveyed, or such part thereof as may " be necessary for the payment of my debts, and other- " ways fully executed the trust hereby committed to " them, within the space of two years from this date, " that then it shall be in the power of my said credi- " tors, or the majority of them, according to the value " of their debts, who shall convene at a meeting to be " called for the purpose, after advertisement in such " newspapers, and for such times as they shall think " proper, to require and compel the said trustee or " trustees, or either of them, for the time, to denude " or give up all management in virtue hereof, which the " said trustee or trustees shall be holden and obliged to " do, in favour of such other trustee or trustees as " shall be named for that purpose by said creditors, or " majority of them, according to the extent of their " debts; and declaring, that the whole debts and sums " of money, principal, annualrents, and penalties if " incurred, due at and preceding the date hereof, shall " be real burdens upon the said lands and estates, to " affect the right and property thereof in favour of such " of my present creditors as shall accede hereto " allenarly, and that in real security for payment of " such debts, aud that preferably to any future debts to " be contracted, or deeds to be granted by me, the said " Robert Hill, or my heirs; and that these presents " shall continue in force and subsist as a real right over " my said lands and heritages, and every part thereof, " as a corroborative and collateral right in security of " payment to the creditors acceding, to the extent of " the debts that are or shall be justly due to them by " any obligation or ground of debt granted by me, the

" said Robert Hill, or my predecessors whom I repre-
" sent, preceding the date hereof, without hurt or pre-
" judice, nevertheless, to the priority or due preference
" of any securities already granted, or affecting my said
" estates at and preceding the date hereof, albeit this
" deed of trust may be rendered ineffectual for the
" purposes hereby intended: But declaring always, as
" it is hereby expressly provided and declared, that the
" real burdens upon the said lands and others created
" by these presents, shall nowise hinder or affect the
" power of the said William Paul, or other trustee
" acting for the time, to sell, convey, renounce, and
" discharge by himself alone, without the concurrence
" of me or my said creditors or others, and the said
" lands and others shall be freed and disencumbered of
" the said real burdens hereby created, and of the haill
" conditions of this trust, by the renunciation, convey-
" ance, discharge, or other deed granted by the said
" trustee acting for the time in the execution of this
" trust, in like manner and as fully as if the said real
" burdens and others had never before been created, or
" the said creditors had separately executed formal
" renunciations thereof, excluding always from the
" effect of this provision and declaration the heritable
" securities granted by me prior to the date of these
" presents; which securities are to remain as entire as
" if these presents had not been granted or acceded to,
" and are only to be discharged and renounced by
" those in right of the same, notwithstanding any clause
" herein that may appear to the contrary. And
" farther, it is provided and declared, that albeit the
" trustees above named shall fail to accept, or shall
" die before the execution of this trust-right, yet, never-
" theless, the same shall noways cease or become void

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

" therethrough; but this present trust-right, and the " infeftments to be taken in virtue hereof, and all that " may follow hereon, shall stand and subsist as a secu- " rity to the creditors whose debts have been contracted " at or preceding this date, and who shall accede to " these presents; and it shall be competent and lawful " to the said creditors, or major part of them, according " to the amount of their debts, real or personal, and not " per capita, nor according to the number of persons " present, at a general meeting to be called, as after " specified, for that purpose, to choose from time to " time a trustee or trustees in succession, for executing " this trust, and the trustee or trustees so to be chosen " shall be as fully invested in right of the whole lands " and others hereby conveyed, and all the powers hereby " committed to the trustees before named, as if they had " been expressly appointed trustees by these presents; " and I oblige myself, if it shall be judged necessary, to " grant all necessary deeds for renewing these presents " in favour of such new trustee: Farther, it is provided " and declared, that the said William Paul, Lindsay " Mackersey, and any other person or persons who may " hereafter be named and appointed trustees in manner " before mentioned, after having acceepted of, and " acted under this present trust-deed, shall be bound " and obliged, before voluntarily denuding of the trust, " to give three months' previous notice of their inten- " tion so to do in writing, to me, the said Robert Hill, " or my heirs, and to the creditors at a meeting to be " called for that purpose: And farther, declaring, that " how soon, and whensoever my said creditors shall be " satisfied and paid of their debts, and the said William " Paul, or other trustee acting for the time, shall be " lawfully and amply indemnified of all engagements

" which shall have been entered into by them for the " purposes of the trust, then the said William Paul, or " other trustee acting for the time, shall be obliged to " make up and fit a final account of their intromissions " with, and management of, the said trust-funds, and " the balance thereof, and the remaining lands, heri- " tages, and other trust-estate, shall be paid over and " reconveyed by the trustee acting for the time, to me, " the said Robert Hill, and my heirs and assignees: " And likewise reserving to my creditors all actions and " diligences competent against me, the said Robert " Hill, for such balances of the said debts as may " remain owing after deduction of such dividends " thereon as may be realized from my means and " estate hereby conveyed, but not until after the pre- " sent trust shall have been brought to a termination. " And farther, I bind and oblige myself, and mine " aforesaid, to grant and to execute, at any time when " required, such farther deed or deeds as may be judged " necessary by my said trustee or trustees, or by a " majority in value of my said creditors, for the more " effectually carrying the purposes of the present trust " into full and complete execution." The deed then contained obligation to infeft, procuratory of resignation, and the following clause of assignation, and clause of warrandice: — " Moreover, I do hereby make and con- " stitute my said trustees, in trust for the uses and " purposes foresaid, and their disponees, my cessioners " and assignees, not only in and to the whole writs, " rights, and evidents, title-deeds, and securities, old " and new, concerning the said lands and others above " disponed, with the whole clauses of warrandice, and " other clauses, tenor, and contents thereof, and all " that has followed, or is competent to follow there-

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

"upon; but also in and to the rents, maills, and "duties, customs, and casualties, due or payable for or "forth of the said lands, for crop and year 1826, and "all arrears of preceding crops and years, and in and "to the tacks of the said lands, and whole prestations "therein contained incumbent on the tenants thereof, "and all diligence and execution of the law compe- "tent to follow thereupon; surrogating and substituting "my said trustees in my full right and place of the "whole premises, with full power to them to do every "thing requisite for completing and establishing the "absolute right and property of the said lands and "others, and titles to the same, in their persons, and "for making the rents thereof effectual, in the same "manner, and as fully and freely in all respects as I "could have done myself before granting these pre- "sents: Which lands and others above disponed, with "this disposition thereof, and resignation and infeft- "ments to follow hereupon, and assignation to the "writs and evidents, I bind and oblige me and my "heirs to warrant to my said trustees, for the uses and "purposes foresaid, and to their assignees, at all hands, "and against all deadly, and the assignation to the "personal estate, and the rents, maills, and duties of "my said lands, from my own proper facts and deeds "only; and I specially empower the said William Paul, "or other trustee acting for the time, to call for and "receive the whole foresaid writings and evidents from "all persons whatever, in whose custody and keeping "the same may be."

Hill pleaded as a preliminary defence, among others, that the trust-deed did not give any title to pursue the action.

The Lord Ordinary, (Jeffrey,) after hearing parties,

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

pronounced the following interlocutor, adding the subjoined note[1] as to this part of the case: — "The Lord "Ordinary, having heard the counsel for the parties "on the preliminary defences, repels the defence or "objection to the title of the pursuer, founded on the "allegation, that the trust-deed in his favour did not "convey any of the profits or emoluments of the office "then vested in the trustee, which occurred subse-"quently to the date of that trust-deed: And, 2do, "In respect that all the other defences pleaded as pre-"liminary, either depend on disputed matters of fact,

---

[1] "*Note.* — The question of title is not without difficulty. But the "Lord Ordinary is of opinion, that the defender, Hill, being at the date of "the trust vested in a life office, which he executed by deputy, and which "yielded large though fluctuating annual profits, is to be regarded as the "owner of a life annuity, which, he apprehends, would clearly have been "carried, by the general conveyance of his whole moveable property and "estate of every description, to his trustee. That he was under a previous "obligation to account for a part, or even the whole of these profits, to his "sisters during their lives, would not bar the effect of this conveyance, as the "radical right to them was still in his person, as incident to the office itself, "of which he was the only holder. If such previous obligation was onerous "and unchallengeable, it was still but a temporary burden upon his primary "right; and that being onerously conveyed to his trustee, such conveyance "would take effect as soon as the burden was worked off, just as the convey-"ance of a fee, under the burden of a liferent, would vest the radical right in "the disponee from the first, though its actual enjoyment must be postponed "till the liferent was run out. If the whole profits were not so pledged to "the sisters, or if their right was not onerous, the form of the action seems "sufficient to make the defender, Hill, still account for them to the pursuer.

"As to the objections raised on the terms of the act 49 Geo. III. cap. "126, as to the sale or brokerage of offices, the Lord Ordinary is satisfied "that it has no application to such a case as the present. The provisions in "the 11th section of that act, are plainly referable only to the case of a party "privily stipulating for a share (or the whole) of the profits of an office, "which, by his resignation or instrumentality, is obtained or secured for "another, and not to that of one who, like the present pursuer, is seeking to "vindicate for their true owners, profits actually drawn by persons, who, in "law and justice, are bound to account for them to others. At all events, "this is a question upon the construction of a public statute, which must "form, if insisted on, an important part of the discussion on the merits of the "case, and could not with any propriety be disposed of as a preliminary and "exclusive plea."

HILL and others v. PAUL and another.

6th Oct. 1841.

Statement.

"or are involved in the merits, reserves and supersedes "the consideration of them till the cause comes to be "discussed on the closed record: And, in respect the "defenders state they do not mean to acquiesce in this "judgment, finds them liable in expenses, allows an "account to be given in, and remits the same to the "auditor of Court for his taxation and report."

Reclaiming notes were presented against this interlocutor, on which the Court, before farther answer, appointed the parties to give in minutes of debate "on "the question, whether to any or to what effect and "extent the emoluments of the office referred to were, "or could be, carried by the trust-conveyance to the "pursuer libelled on."

On advising the minutes, the Court pronounced the following interlocutor on 15th November, 1838:— "The Lords having resumed consideration of this note, "with the minutes of debate and the other proceedings, "adhere to the interlocutor complained of, and refuse "the desire of the notes, reserving all questions as to "expenses."

The defenders in the action appealed against the interlocutors of the Lord Ordinary, and of the Court.

Appellant's Argument.

The Appellant. — I. The deed in the respondent's favour does not contain any mention of the office in question, and the respondent, on his own shewing in his summons, was not aware of the appellant, Robert Hill's, right to the office at the time the deed was executed. However unlikely that ignorance might be, considering the nature of the office, it is sufficient, coupled with the want of any words in the deed mentioning the office,

or suitable to embrace it, to shew that the office itself did not pass, either expressly or by some necessary implication, supposing it to be capable of passing. If such had been the intention of parties, there would have been provision made for discharge of the duties, but the deed contains none, and as little are there any express terms for conveying the emoluments of the office. An arrear of fees might pass under the words "means and estate," but there were not any arrears at the date of execution of the deed payable to Robert Hill, and the fees which were thereafter to arise could not, at the date of the execution, be "means and estate presently "belonging" to the granter. The general words of the conveyance being subjoined to particulars enumerated, cannot be made to apply to particulars of a different nature from those enumerated; Ersk. III. 4, 9; Cunningham v. Livingstone, Mor. 11660; Ross, Mor. 14948, and Peebles, Mor. 5019; Fife v. M'Kenzie, Mor. 2325; Fraser, Mor. app. clause II.; Waddel, Mor. 5022.

II. The obligation upon Robert Hill to grant supplementary deeds was not intended to operate of itself any conveyance, but merely to make effectual the conveyance in the prior part of the deed, by obliging the granter to do what might be necessary for that purpose. The action is not in form to compel implement of this obligation, but proceeds on the assumption that a valid conveyance had been made out and out.

III. The office itself might come within the terms "means and estate presently belonging to me;" but an office of the nature of keeper of a register, in which seriously responsible duties have to be performed, and

HILL and others v. PAUL and another.

6th Oct. 1841.

Appellant's Argument.

which the public have an interest to have duly performed, is not adjudgeable; Wilson v. Falconer, Mor. 165. The grounds of that decision were implied delectus personæ in the nomination to the office. If the office be not adjudgeable, if the law will not effectuate a judicial transference, there cannot, and for the same reason, be any voluntary transference or assignation; the office is then inalienable; Davis v. Marlboro', 1 Swanst. 79; 49 Geo. III. cap. 136, is express. If the office itself is inalienable, are the emoluments of it assignable or adjudgeable, for to this the action of the respondent does in fact amount? The law presumes that the fees of an office are no more than are necessary for its due discharge, and while it will not permit the office to be transferred or attached, will not permit the fees of the office to be meddled with, or courts of justice to speculate as to what may or may not be sufficient, and thereby to endanger the due discharge of the duties; 49 Geo. III. cap. 134; Palmer v. Bate, 6 Moore 28, and cases there cited. But according to the respondents, the whole of the fees were assigned, for the deed carries either the whole or none, and nothing whatever was reserved for the party who was to perform the duties; the conclusions of the action are also to this extent, and are not restricted to the L.300 a-year reserved to Robert Hill by the new grant, or any sum less than the whole.

IV. At all events, whatever right might by possibility be passed by the trust-deed, as against Robert Hill, that deed cannot affect the office in the hands of Graham and Hill, junior, the new patentees, under their grant from the crown. They were not parties to the trust-deed, and while the grant stands unreduced, the office is theirs,

and as little can the pursuer have any right to call them to account for the emoluments of the office, beyond the L.300 a-year, payable to Robert Hill; any payment beyond that is expressly contrary to the 49 Geo. III. cap. 126.

Respondent's Argument.

The Respondent. — I. The respondent does not make any claim to the office, though if he were making such a claim, it would not lie in the appellant R. Hill's mouth, to dispute it on the ground of the inalienability of the office, seeing that if carried by the trust-deed, he is bound to warrant the conveyance. It is the emoluments of the office which the respondent claims. If the office had been saleable, the words of the deed would have been sufficient to carry it and the emoluments; why, then, are they not sufficient to carry the emoluments without the office, which is not saleable? Though the office itself is not adjudgeable, there is nothing to prevent the rights and interests flowing from it to the holder from being adjudged; Hunter v. Gardner, 5 W. and S. 616. The emoluments arise not ex contractu with the parties using the record, but virtute officii; no doubt the fees in some sense are not due till earned, but they arise out of a right which existed at the date of the trust-conveyance, and the terms of that deed are sufficiently comprehensive to embrace that right. The purpose of the deed was a general conveyance for payment of creditors, any attempt to limit its terms by reason of any particular enumeration, is to go against its express object, and is excluded by the words "without prejudice to the said "generality."

II. The plan of the trust-deed was a general com-

HILL and others v. PAUL and another.

6th Oct. 1841.

Respondent's Argument.

prehensive conveyance, implying the probability of supplementary conveyances of particular estates becoming necessary, and in this view the dispositive clause, and the obligation to grant all farther deeds necessary, must be taken as fully vesting the right.

III. If Hill could be trustee for his sisters, why not for his creditors? He might unquestionably have made payments from time to time out of the emoluments towards discharge of his debts, why, then, may he not enable another to do so for him? It does not necessarily follow that what is not attachable is not assignable.

Ld. Chancellor's Speech.

LORD CHANCELLOR. — My Lords, I have considered this case with much anxiety, and am unable to concur in the judgment of the Court of Session, upon the point which, four out of five Judges, decided in favour of the pursuer, and am also of opinion, that the judgment cannot be supported upon another ground, which does not appear to have been the subject of much consideration below. The decision having been taken upon the preliminary defences, the statement in the summons is to be strictly attended to; it states, that Robert Hill was, at the date of the trust-deed, keeper of the register of sasines for the county of Renfrew, under a commission or appointment by the crown, and that he drew and applied the whole fees and emoluments for his own behoof, at least since the death of his sister Helen, in 1835, his brothers and sisters having and claiming, during their respective lifetimes, some share or interest in the fees and emoluments arising from the said office. It also sets out a letter of the 22d of July, 1836, in which the pursuer demands of the defender, an account and

payment of what he had received from the office, from the period of the death of his sister, Helen Hill. The pursuer's title is under a trust-deed for creditors, dated the 26th of October, 1826.

It appears from this statement, that at the date of the trust-deed in 1826, Robert Hill was entitled for life to the office, but that the profits of it were to a great extent, if not the whole of them, applicable to other purposes, and that his prospects of any considerable income from it, were expectant upon the decease of his brothers and sisters in his lifetime. The first question, and that upon which the case was decided below, is, Whether the trust-deed included the profits, and it is competent in putting a construction upon that deed, to consider the circumstances in which the defender and his property were placed at the date of it. There is not in the deed any mention of the office, and it is matter of dispute, whether the pursuer and the creditors of Robert were aware that he held it. It is not very probable, that the persons with whom he was so connected, were ignorant of it, but still there is no proof that they knew it; had their knowledge of it appeared, it would have been impossible for the pursuer to contend, that there was any intention of affecting the future profits of the office by this deed. The peculiar circumstances of the property so intended to be affected, would necessarily have called for, and produced very special and peculiar provisions in the deed; but still, although the creditors might know nothing of this property, and therefore have entertained no intention respecting it, the terms of the deed might have been so general, and so calculated to include it, as to have been binding upon the defender, if there were no objection in law to his so dealing with the future profits of his office. In that case the general intention

HILL and others v. PAUL and another.

6th Oct. 1841.

Ld. Chancellor's Speech.

of passing all that the defender then had, or might at any time become entitled to, if expressed in the deed, would have supplied the want of any particular intention with respect to the office in question.

Now, it is not in dispute, that the office itself being held under the crown, and for public purposes, was not assignable; and the question is, Whether the future profits are included in the terms of the deed, for, whether the defender was entitled to any part of such profits in possession, or was as to the whole in expectancy only until the death of the survivor of his brothers and sisters, the whole which could have been the subject of assignment consisted of profits thereafter to arise, and not any property in possession — but the terms of the deed are, "And in general my whole means and estate, "heritable, and moveable, of whatever nature or deno- "mination, or wherever situated, presently belonging to "me." — If the office had been assignable, it might have been included in these terms, it would have been "means and estate presently belonging" to the author of the deed, and, of course, all future profits of the office would have passed as part of it. But as the office did not pass, how can these words be made applicable to profits thereafter to arise from the office which, it is admitted, continued with the original holder? Suppose there had been from this general description, some particular property excepted, could it have been contended, that future profits arising from such property were included? The office must be considered as excepted, because it was not by law assignable, which the parties must be supposed to have known.

If it were necessary to resort to other parts of the deed, to aid this construction of the terms used in describing the property intended to be included in it,

the particular enumeration which follows may most properly be used for that purpose. In fact, all the trusts and provisions of the deed are inapplicable to the future profits of the office. The trustees are to enter into "immediate possession and use of the whole estate, and "arrears above conveyed, and to sell the same," and it contemplates the completion of the trust within two years, and in speaking of future "rents, prices, and "produce," it confines itself to "rents, prices, and pro- "duce of my said estate and effects," — whereas the office, that is, the estate which was to produce the profits in dispute, is admitted not to be included in the deed, and therefore formed no part of the truster's "said "estate and effects."

It seems, indeed, to have been felt that there was great difficulty in bringing the future profits within the terms used, but it was said, that the deed contained a provision for the trustees to grant such farther deeds as might be necessary, which obligation it was said, "per- "fected the general one, although there was no specific "conveyance of the emoluments of the office." It appears to me, that the provisions in question, cannot have any such effect; it is merely a clause for farther assurance of what was intended to be included in the prior grant, and was not intended to affect any property not included in it. If the description included the profits in question, no farther deed could carry it farther; and if the former description did not include it, this provision has no reference to it. The farther deed is "for "the more effectually carrying into execution the pur- "poses of the present trust."

If the only question had been what I have hitherto considered, I must have adopted the opinion of Lord Medwyn, opposed as it is to the high authority of Lord

HILL and others v. PAUL and another.

6th Oct. 1841.

Ld. Chancellor's Speech.

Jeffrey, (the Lord Ordinary,) Lord Glenlee, Lord Justice Clerk, and Lord Meadowbank; and finding upon this point, sufficient ground for reversing the interlocutors appealed from, the point which I am about to observe upon must not be considered as the ground of the judgment of this House, which I am the more anxious to have understood, because, as it does not appear to have been the subject of much consideration below, I should regret that the decision of this case, should, under those circumstances, preclude discussion in Scotland, if it should hereafter arise upon a point as to which this House has not had the benefit of the judgment of the Court of Session. The point to which I allude, is the legality of assigning the future emoluments of this office. It is a public office granted by the Crown for the benefit of the subject, to which, or to some other, for the same purposes, a large class of the subjects of Scotland must resort, and are compelled to pay certain sums for the duty performed, which constitute the profits of it. The parties resorting to this office, not only have an interest in the due performance of those duties, but have a right of action against the holder of the office, if, from any neglect of his, they sustain damage. Whether the emoluments exceed what may be considered necessary for the due performance of those duties, and to meet this responsibility cannot be matter of inquiry in this suit. It must be assumed, that the public are not taxed higher than is necessary to secure to them the due performance of the duties of the office, and the officer's responsibility in case of any demand arising against him. What then would be the effect of this deed, if it included the future profits of the office? Certainly, to deprive him of all the profits of it, after discharging the necessary expenses; for the Court cannot have any right to restrict the generality

of the terms used by an implied exception of what may be necessary for the officer's subsistence.

That such an assignment would be held to be illegal and void in England, is not the subject of doubt. No two cases can be more similar than this case and that of Palmer v. Bate, in 2d Broderip and Bingham, 673. The cases there cited, supersede the necessity of my referring to others, except that I may mention Lord Eldon's observations in Davis v. Duke of Marlborough, as I do not find them referred to in the former case. Is there then any difference between the laws of the two countries upon this subject? The rule is established upon principles of public policy, applicable equally to both; but where is the decision that established, that all the future profits of an office which cannot itself be assigned, may be transferred by the holder of the office to his creditors. Erskine, in Book II, title 12, section 7, says, "That offices of trust conferred during pleasure, "or for life upon personal regard, cannot be apprised "or adjudged;" and in Book III, title 6, section 7, he says, "The King's pensions are not arrestable, be- "cause they are alimentary, and, indeed, all salaries "annexed to offices, in so far as they amount to no "more than a reasonable allowance, for the decent sup- "port of those who are named to them, ought, upon "the same ground to be accounted alimentary."

6th Oct. 1841.

Ld. Chancellor's Speech.

The principle therefore upon which the English decisions have proceeded, is to be found in the law of Scotland, as might well be expected, but it happens that the very case now under consideration, has received a judicial decision by the Court of Session. In Wilson v. Falconer, on 7th December, 1759, reported in Morrison, 165, it was decided, that the office in question was not adjudgable by creditors, and the effect of the deci-

HILL and others v. PAUL and another.

6th Oct. 1841.

Ld. Chancellor's Speech.

sion was totally to repel the creditors' claim. Lord Kaimes, indeed, seems to have thought, that an adjudication of the emoluments would have been competent. The decision, however, did not recognize that declaration, and the principle upon which it was founded, is as applicable to the emoluments as to the office itself. I will not pursue this subject farther, because it is not the ground upon which I intend to propose to the House to reverse the judgment of the Court below. What I have said will, I hope, secure attention to the point, if it should hereafter arise for decision.

I therefore move your Lordships to reverse the interlocutors appealed from, to sustain the preliminary defences, and dismiss the action, and to find the appellant, the defender, entitled to the expenses of the suit below.

Judgment.

Ordered and adjudged, That the interlocutors complained of be reversed. And it is farther ordered and adjudged, that the appellants are entitled to the expenses of suit in the Court below.

ARCH. GRAHAME, Agent.

[Heard, — Judgment, *Oct.* 6, 1841.]

MRS CHRISTIAN STEWART or MENZIES, and CATHERINE MENZIES, and JOHN MENZIES, Appellants. (No. 22.)

JOHN MENZIES, Esquire of Chesthill, Respondent.

Marriage. — Promise of marriage, on condition of a future event, excludes application of the fiction, that consent de presenti was given at the moment of copula.

Id. — A declaration in the event of a child being born of an existing connection, cannot receive effect to constitute marriage, though the condition should be purified.

Seduction. — What held not to amount to proof of.

Proof — Marriage. — It is competent to prove by parole the circumstances under which, and the intention with which, a letter was written and delivered, to the effect of negativing its having been intended to form a contract of marriage, which its terms, without such evidence, might have imported.

Id. — *Marriage.* — Circumstances in which the evidence of relations was held to have been properly excluded.

Process — Jury Trial. — Where a record has been made up and evidence taken before the Commissaries, with a view to declarator of marriage, an alternative conclusion for damages for seduction ought not to be remitted for trial by jury.

Costs should always follow the judgment in affirmance.

2d DIVISION.

Lord Ordinary Jeffrey.

Statement.

THE appellants brought action against the respondent, for declarator of marriage between the first appellant and the respondent, and for adherence, and alternatively for damages, by reason of seduction, in case it should be found, that the first appellant and he were not married persons. The narrative of the summons was in these terms: — "That, in the month of April 1825, or about "that period, the pursuer entered as housekeeper into "the family or domestic establishment of the defender,

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" at his residence of Duneaves, and continued to live " therein, down to the term of Whitsunday 1827: " That soon thereafter, and while living at the said " residence of Duneaves, the said John Menzies pro- " fessed the greatest love and affection for the pursuer: " That, in consequence of the said John Menzies, " defender, his repeated addresses and solicitations, and " of his promise to marry the pursuer, the said Chris- " tian Stewart or Menzies, she agreed to accept of him " as her husband, and accordingly, the pursuer, admitted " him to all the privileges of a husband, and he co- " habited with her as his wife: That in consequence " of the said promise, and subsequent cohabitation " on the faith thereof, the pursuer and the defender " became married persons: That the defender, upon " the 25th March 1826, acknowledged and declared " the said marriage, by the following document, holo- " graph of himself: 'Duneaves, 25th March, 1826.— " 'CHRISTY, — You and I having lived together as " 'man and wife for some time, I hereby declare you " 'to be my lawful wife, in the event of a child being " 'born, in consequence of the present connection be- " 'twixt us. — And, I am, yours truly.' (Signed) " 'JOHN MENZIES of Chesthill:' That, both previous " and subsequent to the date of the said document, the " defender owned and acknowledged to various and " sundry persons, and on various and sundry occasions, " and in various and sundry ways, that he was married " to the pursuer: That the other pursuer, the said " Catherine Menzies, was procreated of the said mar- " riage, and was born upon the 10th day of June, 1827: " That the other pursuer, the said John Menzies, " junior, was also procreated of the said marriage, and " was born on or about the 18th day of November, " 1829: That after the foresaid promise of marriage,

" and consummation thereof, and down to a recent " period, the defender owned and acknowledged, treated " and entertained, behaved to, and cohabited with, the " pursuer, as his wife: That ever since the birth of the " pursuers, the said Catherine Menzies, and John " Menzies, junior, the defender acknowledged them as " his lawful children, and treated them as such: That " from the foresaid document above quoted, and the " facts and circumstances above set forth, and other " facts and circumstances to be proved, it will be made " to appear, that the pursuer and the defender are mar- " ried persons, husband and wife of each other, and that " the other pursuers, the said Catherine Menzies, and " John Menzies, junior, are their lawful children."

The respondent denied the statements in the summons, so far as they implied marriage or seduction, and alleged that the letter founded on, had been given by him to the appellant, to enable him thereby to impose on the relations of a young lady to whom he had made proposals of marriage, a belief, that it was beyond his power to enter into that state, and pleaded, —

" I. That as the promise of marriage contained in " the letter libelled on, was qualified by the condition, " that a child should be born in consequence of the " illicit connection, the presumption that an agreement " to marry was interchanged at the time of the subse- " quent copula, was necessarily excluded.

" II. That an express declaration that the appellant was " his wife would not constitute a marriage, if it could be " proved, that, at the time when it was made, neither of " the parties intended that it should have that effect.

" III. That as he did not seduce the pursuer, he was " not liable to her in the damages, which she alleged that " she had sustained in consequence of her seduction."

In the course of making up the record, the appellant

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

averred, that the letter of 25th March, 1826, had been delivered to her by the respondent in the latter end of 1827, or beginning of 1828, to satisfy her anxiety as to the nature of their connection — that she had lived with him, and been treated by his household as his wife, both prior and subsequent to the date of the letter — and that their connection as married persons, had been concealed at the request of the respondent, with a view to the feelings of his relations.

The Lord Ordinary, after closing the record upon condescendence and answers for the parties, remitted to the commissaries to take the proof of the parties. The appellants reclaimed against this interlocutor, and prayed the Court to find among other things, — 1st, That the letter of the 25th March, 1826, which was holograph of the respondent, together with the admitted cohabitation of the parties subsequent to the letter, constituted a legal marriage. 2d, That the allegations made by the respondent, in order to evade the consequences of his own legal admissions, that the said letter was false and prepared by himself or his agents, under instructions from him for purposes of fraud, could not be admitted to probation.

On 6th June, 1833, the Court "having heard counsel "on the points of law, in the second prayer of the re-"claiming note," appointed parties to prepare cases thereon, and on advising these cases, adhered to the interlocutor of the Lord Ordinary, "it being under-"stood and hereby declared, that the proof shall be "held as before answer."

The case went to proof, and witnesses were examined by the appellant, to prove marriage by cohabitation, and habit and repute, both prior and subsequent to the date and the delivery of the letter of 25th March, 1826, with the view of establishing a marriage independent of that letter, and also of establishing a marriage either at the

date of the delivery of the letter, or of the birth of her first child. On the other hand, the respondent led proof, to shew the circumstances under, and the reasons for, which that letter had been written, and delivered to the appellant.

The evidence led by the appellant consisted principally of the household and other servants of the respondent, to the exclusion of the brothers and sisters and sisters-in-law of the appellant, who likewise were in the service of the respondent, during the period of his intercourse with the appellant; and so far as it went to establish marriage independent of the letter of 25th March, 1826, it was held to have altogether failed. The import of the proof formed no part of the argument in the printed case, nor, as is believed, at the bar of the House of Lords; and therefore, the appellant apparently acquiesced in the opinion of the Court below, on the supposition that the evidence of the relatives was rightly excluded. This exclusion, however, formed the subject of argument on the appeal.

With regard to the circumstances in which the letter had been written and delivered to the appellant.

Allan Macdougall, examined by the appellant, swore, — "That he understood that the defender was "with his regiment at York in 1827, but the deponent "had no occasion to see him there. Depones, That "there was some of the deponent's own family residing "at York then with his the deponent's mother: That "two or three of his sisters were then there with her. "Depones, That he has occasion to know that the de- "fender paid particular attention to the deponent's "youngest sister, named Colina, and this he learned "from the defender himself. And the deponent was "informed by the defender that he had proposed mar- "riage to her. Depones, That the deponent went to

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" his brother's place of residence of Dunolly, for the " purpose of being present at the ceremony of the mar- " riage, which was to have taken place there. Depones, " That this marriage did not take place, but was broken " off on account of a letter which was shewn to the de- " ponent by his brother, and said to be written by the " defender to a woman of the name of Christy or Chris- " tian Stewart: And a copy of the letter libelled on " being shewn to the deponent, depones, That it was a " copy of that letter, in the defender's handwriting, " which was shewn to him. Interrogated, In what " manner the deponent first came to learn that the mar- " riage had been broken off? Depones, That upon his " arrival at Dunolly, in July or August, 1828, when he " went out for the purpose before specified, he met his " brother, Captain Macdougall on the highway, near " his own gate, who told him that he had just returned " from Tynedrum, having gone there in consequence " of a letter from the defender, which he shewed the " deponent, desiring him, the Captain, to meet the de- " fender at Tynedrum on business of importance: That " his brother then shewed him a copy of the said letter " libelled on, which he had got from the defender, and " asked the deponent's opinion about it, when the de- " ponent having perused it, said, he must believe that " it was delivered, and if so, that he was decidedly of " opinion the marriage should go no farther. Interro- " gated, depones, That the deponent, in a day or two " afterwards, went to Duneaves, and saw the defender; " and he carried the copy of the letter with him, and " shewed it to the defender, when the defender acknow- " ledged that it had been written by him; and he is " positively certain, that he then stated that the princi- " pal letter was delivered to the woman to whom it was " addressed of the date it bore. Interrogated, Whether,

" upon that occasion, the defender repeated solemnly " to the deponent that he was a married man? De- " pones, That he certainly did not repeat solemnly this, " as the deponent did not put such a question to him " — he deeming himself, as a professional man, a better " judge of the consequences of granting such a letter " than the defender himself. Depones, That when the " deponent left the defender on this occasion, he inti- " mated to him that he considered the marriage finally " broken off. Depones, That the defender never inti- " mated after to the deponent, or to his sister, or any " of his family, so far as the deponent knows, that he was " a free man, and still at liberty to marry. Depones, " That when he was at Duneaves, upon the occasion " last deponed to, he saw the pursuer, and conversed " with her on the subject of the letter: That the de- " ponent himself may have suggested this to the defender, " who approved of it, and said it was highly proper. " And being asked to mention what occurred at the " interview between the pursuer and him, depones, " That when he first went in, he thinks that the pur- " suer said to him, that she was aware who he was: " That the deponent then asked her if she had a letter " in her possession from the defender, — leading her to " understand the import of it, — to which she replied, " that she had: That the deponent then asked her if " she would shew it, to which she answered that she " would not. She said she had it and would keep it; " and that she had been told by persons as well qualified " to advise her as the deponent was, that it was a good " letter: That the deponent then told her, that he was " authorized by the defender to come to her, and to get " a sight of the letter, and also to offer her a sum of " money for possession of it, but she said that she would

Stewart and others v Meffens. 6th Oct. 1841. Statement.

" not give it up for any sum of money that the defender " could offer. Depones, That the deponent remained " about ten or fifteen minutes with the pursuer, and " came away without seeing the letter; and he does not " recollect any other thing that passed. Depones, That " the defender afterwards paid damages to the amount " of betwixt three and four thousand pounds, on the " footing of his being unable to fulfil his marriage " engagement with the deponent's sister. The de- " ponent, of his own accord, added, that perhaps it " should be stated that the damages were paid on ac- " count of the defender's apparent inability to fulfil his " engagement, for at that time the deponent had a sus- " picion that there were circumstances connected with " that letter, not explained to the deponent by the de- " fender. Interrogated for the defender, Whether, " during the interview which he had with the defender " at Duneaves, as above deponed to, the defender gave " any account of the time when, and of the circumstances " under which he had delivered the letter to the pur- " suer? Depones and answers, That the defender " mentioned that, on one occasion, he had entered the " kitchen, where he expected to find the pursuer and " some of her friends, along with some of his own " tenants, at a ploy of some kind: That he found these " persons so assembled: That the defender said, before " the people present there, that Christy was, or to be " his wife; and some male relative of the pursuer's " drew out the letter, and that the defender had then " subscribed it: That, on making this statement, the " deponent reminded the defender, that he previously " stated that the letter was in his own handwriting. " The defender then stated, that he supposed that he " had copied it over on the following morning, and

" subscribed it, having, as the deponent understood, " adhibited his subscription to the first draft the night " before: That the deponent asked the defender if he " had been drinking before he did this, and he answered " that he had: That the deponent put the question to " him, Whether he was so drunk as not to know what " he was about, and the defender answered that he could " not say so: That the defender gave the deponent to " understand, that the transaction above referred to, " took place at the date which the letter bears: That " the defender distinctly stated to the deponent at the " time, that the letter was written and delivered at the " date which it bears: That his interview with the pur- " suer took place at the house in which he understood " she then resided: That he thinks she was sewing when " he went in, and being interrogated, Whether the pur- " suer seemed to expect him? depones, That he can- " not say that she expected him, but she seemed to " know who he was, and that the deponent had never " seen her previously, to his knowledge: Interrogated, " Whether, during his interview with the defender, " any thing was said about writing to Mr Sharpe, his " agent in Edinburgh, requesting him to take steps to " recover the letter from the pursuer? depones, That " there was. And on being shewn the letter produced " in process, No. 19, and addressed by the defender to " Mr Sharpe, and being interrogated, Whether it was " written on that occasion, in presence of the deponent? " depones and answers, 'I think it was, or a letter of " 'similar import.' And said letter, No. 19, is marked " by the deponent and Commissary-Examinator of this " date, as relative hereto. Interrogated, Whether he " considered the letter libelled on, addressed to the pur- " suer, as the principal obstacle to the defender's marry-

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" ing the deponent's sister? depones, That he did: " But that he stated to the defender at the time, that " he was so dissatisfied with his conduct, that even if " the letter were destroyed, he would not consent to the " marriage going on. Interrogated, Whether the de- " fender stated that he had given the letter to the pur- " suer with the intention of making her his wife? De- " pones and answers, 'I never put that question to " 'him, but I asked him if he understood the import of " 'that letter, and he said he did.' Depones, That the " deponent's first interview with the defender, before " he had seen the pursuer, lasted for about half an " hour. Depones, That he now recollects that he saw " the defender, as he thinks, on the day before the con- " versations already deponed to took place, but that the " defender was then confined to bed in consequence of " bruises from a fall, and begged the deponent to delay " talking upon the subject about which he came till the " following day, as he was in bodily pain, and it was " difficult for him to speak: That the deponent had " been in the neighbourhood for about two days endea- " vouring to procure an interview with the defender, " but had failed: That he had called twice at the house, " and was told he was from home, and the deponent " followed him to places where it was said he had " gone, but did not find him. Interrogated, Whether, " after the interview with the defender at Duneaves, " there was any impression left upon his mind that the " whole truth had not been told him with regard to the " letter? Depones and answers, 'I had an impression " 'then that I had not been told the whole facts; and " 'one circumstance that excited my suspicion was, that " 'I had not seen the letter in the possession of the " 'pursuer; and that and other circumstances which I

" 'talked over with the late General Stewart of Garth,
" 'satisfied me at the time that there was a mystery
" 'about the letter which I could not explain.' De-
" pones, That the deponent had not seen, at least had
" had no conversation with the defender for nearly a
" year before he met him at Duneaves, and had never
" till then spoken with him on the subject of his mar-
" riage with his sister. And being farther interrogated,
" depones, that he has no doubt that the letter
" addressed to Mr Sharpe, already shewn to him, or
" one of similar import, was either written in his pre-
" sence, or shewn to him by the defender, as a letter
" which he intended to despatch to Mr Sharpe, on the
" occasion above deponed to: That, to the best of his
" recollection, the letter shewn to him is certainly the
" same. Depones, That, on farther recollection, he
" thinks he left Dunolly to proceed to Duneaves on the
" 14th or 15th of August, 1828."

John M'Dougall, examined by the appellant, swore, — " That he is acquainted with the defender: That the
" knew him some time previous to the year 1828, but
" saw him very seldom during that year. Depones,
" That he made proposals of marriage to one of the
" deponent's family, and some steps were taken after-
" wards with a view to a marriage. Depones, That the
" first intimation which the deponent received that the
" marriage was not to go on, was his receiving a letter
" from the defender. Depones, That he cannot say
" what became of the letter: That it is not in his pos-
" session now: That he cannot say whether it is in
" existence or not: That the defender's letter to the
" deponent merely requested an interview: That the
" deponent, in consequence, had an interview with the
" defender at Tynedrum: That the defender produced

Steware and others v. Menzies. 6th Oct. 1841. Statement.

"to the deponent at the interview a copy of a letter "which bore to be addressed by him to a female. "Depones, That to the best of his recollection, the "copy of the letter shewn him by the defender, was of "the import of the letter libelled. Depones, That the "deponent was completely satisfied by the production "of the letter by the defender, and by his declaring to "the deponent that it was an exact copy of the original "which he had written and delivered to the pursuer "some time before, but whether of the date which it "bore, the deponent cannot say: That it was unneces- "sary for him to put any questions to the defender: "That nothing was said about the date on the occasion: "That the deponent thinks, to the best of his recollec- "tion, that the expression employed by the defender "was, that the letter had been delivered a 'length of "'time before,' by which the deponent understood a "great many months before to be implied. Depones, "That the deponent cannot recollect, at this distance "of time, what passed particularly, or whether any "questions were put by him on the occasion to the de- "fender: That he felt perfectly satisfied upon the pro- "duction of the letter, that it was unnecessary for him "to put any questions to the defender at all upon the "subject of marriage. Interrogated, Whether the de- "ponent recollects of any thing being said to him by "the defender, of his having acknowledged the pursuer "as his wife? Depones and answers, 'I recollect there "'was a great deal of conversation passed, but I can- "'not now recollect the exact tenor or import of it.' "Depones, That the interview might have lasted, per- "haps, from twenty minutes to half an hour. Inter- "rogated, depones, That he had a subsequent interview "with the defender: That it might have been at the

" distance of a few weeks. Interrogated, Whether, at " this second interview, the defender acknowledged to " the deponent that he was a married man, or that he " was married to the pursuer? Depones and answers, " 'I certainly never put any such question to the de- " 'fender, nor can I say that the defender made any " 'such acknowledgment to me; after his producing to " 'me the letter, as I have stated, the subject of mar- " 'riage was one which I would not have allowed him " 'to enter upon in my presence.' Interrogated, " Whether the marriage was broken off, in consequence " of what passed at the interview at Tynedrum? De- " pones and answers, 'Certainly.' Depones, That the " defender paid damages, in consequence of his breach " of promise of marriage to the member of his family. " Interrogated for the defender, depones, That, to the " best of the deponent's recollection, the meeting at " Tynedrum deponed to, took place in July or August " 1828: That no person was present at the interview, " except the defender and deponent: That the de- " ponent met with the defender upon two occasions " after being at Tynedrum, but whether the first was " at Edinburgh or at Perth, he cannot positively say " which: That no person was present, except himself " and the defender."

The letter referred to by this witness, as having been written by the respondent to Mr Sharpe, was in these terms: —

" *Duneaves*, 24th August, 1828.

" Dear Sir, — I some time ago was imposed upon to " give a letter, a copy of which I will hereafter shew " you, to a woman who has born a child to me. The " letter, she informs me, she intends employing to pre- " vent my forming any marriage connection. I have,

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" therefore, to request that you will, without delay, " take such steps, legal or otherwise, as you may judge " most expedient to prevent her making any hurtful use " of that letter. In the meantime, I would recommend " your coming to me here for farther information. I " am, dear sir, yours truly,

" Private. (Signed) JOHN MENZIES."

" WILLIAM SHARPE, Esq., W.S.

5, Frederick Street, Edinburgh."

James Stewart, who was the uncle of the appellant, but not upon the best terms with her, when examined by the respondent, swore inter alia, — " That neither " during her pregnancy, nor after the birth of the child, " did the pursuer ever say to the deponent that she had " any promise of marriage from the defender: That he " remembers of a letter being written by the defender " to the pursuer, about the middle of summer, 1828. " Depones, that he did not see the letter delivered to " the pursuer, but he got a sight of it afterwards from " the pursuer: That the pursuer told him when she so " shewed him the letter, that she had got it from the " defender a few days before. Depones, That the letter " was not dated in that year, but was put back two " years. Depones, that the pursuer and the deponent " had a conversation about the letter, when the pur- " suer told the deponent that it had been given to her " for the purpose of the defender's getting quit of a " Miss Macdougall: That the pursuer seemed very " careless about the letter at that time, but he does not " recollect of her saying any thing about its being given " back: That his wife, nor no other person, was pre- " sent at this conversation: That before the letter was " seen by the deponent, he had not heard from the " pursuer any thing about it. Depones, that at that

" time the deponent never heard from the pursuer, or " any other person, that the pursuer was the defender's " wife. Being interrogated and shewed the letter " libelled on in the Summons, and being No. 3 of " process, Whether it is the letter shewn to the witness " by the pursuer in summer 1828, as before deponed " to? Depones, that he cannot exactly say, but it is " very like it; and adds, that he said to her at the time " that the letter was of no use."

Christian Stewart, the wife of James, examined by the respondent, swore, — " That the pursuer never on " any occasion said to the deponent that she (the pur- " suer) was married to the defender, or had a promise " of marriage from him. Depones, That to the best of " her recollection, in the year 1828, she had a little " conversation with the pursuer on the subject of a " letter from the defender to the pursuer. Depones, " That the pursuer said that the defender had said to " her, if she would receive a letter from him, it would " serve him 'a great deal,' and that it would do her " no harm, and that he would stand her friend. " Depones, That 'it was on account of a young " 'lady who had a promise of marriage, as she thinks, " 'and that it was to get, in her opinion, the better of " 'that promise;' and that that was what the pursuer " said. Depones, That the pursuer said she did not " know whether to take the letter or not: Depones, " That she knows the pursuer got the letter from the " defender. Depones, That the pursuer shewed the " letter to the deponent. Depones, that the letter was " dated two years back, and the pursuer told her so. " And being shewn the letter libelled on, No. 3 of pro- " cess, depones, That she thinks it exactly the same, at " least if it is not, it is very like the one shewn her, as

Stewart and others v. Menzies. 6th Oct. 1841. Statement.

" before deponed to. Depones, that the pursuer said " to the deponent that the defender had desired her, if " a gentleman called upon her, not to shew the letter, " but that she, the pursuer, did not say what was to be " done with it. Depones, That the pursuer said to the " deponent, that the defender said to the pursuer, that " he was to get back the letter again. Depones, that " the pursuer said to the deponent, that she, the pur- " suer, was desired by the defender to keep the letter in " her pocket some days, so that it might have the " appearance of being old. Depones, That she re- " members a gentleman calling at the house soon after " the occasion above deponed to, whom she heard was " Mr Allan Macdougall. Depones, That she thinks " Mr Macdougall saw the pursuer: That she does not " remember having any conversation with the pursuer " as to what passed betwixt her and Mr Macdougall. " Depones, that some time after this she had some con- " versation with the pursuer about the letter. Depones, " That she was one day in the house when the defender " wanted the letter back. Depones, that the pursuer " said that she had not the letter, that her brother " Donald had it; but that was a lie, for she had it in " her drawer, and she would not like to be found out in " a lie by the defender. Depones, that she does not " remember of any conversation with the pursuer on the " subject of the letter, betwixt the occasion last alluded " to, and the occasion of its being delivered as aforesaid. " Depones, that she remembers the birth of the boy. " Depones, That her husband stood godfather. De- " pones, That the deponent never thought any thing " else, but that both of the pursuer's children were bas- " tards. Depones, that the defender had been there " shortly before, and the pursuer had asked him to

"marry her before the thing became public, but that "the defender got up in a great rage. Depones, That "the pursuer said she had given a sore heart to another, "meaning Miss Macdougall, as the deponent under- "stood; and that she (the pursuer) should have had "nothing to do with the defender's letter or himself; "but she deserved to have a sore heart likewise."

Charles Stewart, examined by the respondent, swore, —"That he was tutor in the family of the late Mr "Stewart of Crossmount, in the years 1831 and 1832: "That Mr Stewart died in December last, 1834: That "in the end of summer, or beginning of harvest, in the "year 1831, the deponent saw the pursuer, Christian "Stewart, at Crossmount: That he had no conversa- "tion with her himself: That the pursuer, on the "occasion referred to, was in company with the late "Mr Stewart of Crossmount. Depones, That after the "pursuer went away from Crossmount, Mr Stewart "told the deponent something of what had passed "betwixt him and the pursuer on the said occasion. "Interrogated, What did Mr Stewart state to have "passed betwixt him and the pursuer? The counsel "for the pursuer objected to this interrogatory, upon "the ground that it was an attempt to prove by hear- "say a conversation, and not a fact in the case. To "which it was answered by the counsel for the defender, "That as Mr Stewart died before the defender had an "opportunity of entering upon his proof; and it being "for the Court to judge of the weight due to the testi- "mony, it was perfectly admissible, and did not fall "under the objection of hearsay evidence, to the effect "of excluding the testimony. The commissary-exami- "nator having considered the objection and answer, "repels the objection, and allows the interrogatory to

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" be put; and the interrogatory being again put, " depones, That Mr Stewart said the pursuer had " called upon him to consult with him as to raising a " law plea against the defender. Interrogated, Whether " Crossmount stated any thing to the deponent as to a " letter which the pursuer said she had from the " defender? Depones, That Crossmount said the pur- " suer told him that she had a letter from the defender, " and that he, Crossmount, had asked her whether it " had not been given her for a certain purpose; and " that she acknowledged that it had been given to her " to keep off a Miss Macdougall, and to free him, the " defender, from some obligations he had come under to " Miss Macdougall. Depones, That the conversation " above deponed to, took place at dinner on the very " day that the pursuer called at Crossmount. Depones, " That the late Mr Stewart of Crossmount was a Cap- " tain in the army, and did not belong to the profession " of the law."

Mrs Jean Stewart, widow of Mr Stewart, referred to by Charles Stewart, examined by the respondent, swore, — " That there was found in her husband's repo- " sitories a paper, entitled, 'Memorandum, — Note of " 'a conversation with Christy Stewart, 1831,' holo- " graph of Mr Stewart, which the witness now pro- " duces, and being interrogated in causa, depones, That " the deponent recollects of the pursuer coming to " Crossmount House in August, 1831: That the " deponent had no conversation with her: That the " pursuer was some time in conversation with Mr " Stewart, and the deponent observed her afterwards " leave the house. Depones, that Mr Stewart, imme- " diately after the pursuer left Crossmount, told the " deponent that the pursuer had come to borrow money

" from him, to enable her to carry on some law pro-
" ceedings against the defender. Depones, that Mr
" Stewart called upon the pursuer to give up a letter
" which he understood she had got from the defender,
" in order that the defender might get quit of a Miss
" Macdougall: That Mr Stewart stated to the depo-
" nent that the pursuer admitted that she had got that
" letter for the purpose referred to. Interrogated for
" pursuer, Whether she knows when the memorandum
" deponed to was written? Depones, That she did not
" see the memorandum until after her husband's death,
" or know of its existence: That her impression is, that
" it was written immediately after the pursuer went
" away, and her reason for thinking so is, that she had
" occasion to be in Mr Stewart's business room in the
" course of the day, after the pursuer's going away,
" and she found him busy writing. Depones, That it
" was the deponent herself who found the memorandum
" in Mr Stewart's travelling-case."

The memorandum referred to by this witness was in these terms: —

" MEMORANDUM, — Note of a Conversation with
" CHRISTY STEWART, 1831.

" Christy Stewart came to Crossmount with her
" brother Alexander, (who had been several years in my
" service as a herd,) in the latter end of July or begin-
" ning of August. She told me she came to consult me
" as to what course she should follow with Chesthill, as
" he had deserted her and her children. Christy and
" me are not very well acquainted. She assigned as a
" reason for coming to consult me, that her family were
" originally from my property, and that many of her kin-
" dred were still upon my lands, and about my family,

Stewart and others v. Menzies. 6th Oct. 1841. Statement.

" and that I was the only gentleman she knew whom " she could consult and advise with. As I heard a variety " of stories through the country about Chesthill, a Miss " Macdougall, and Christy, I told Christy that she " would be most welcome to the benefit of my advice, " and that if it appeared proper, I would procure for her " better advice than I could give her, (meaning that I " would obtain legal advice and opinion for her,) but be- " fore I could give her my advice or opinion, or ask that " of another for her, it was necessary she should tell the " whole truth fairly and candidly, as there were many " stories gossipped through the country that did not " agree. We then had a long conversation on the sub- " ject, in course of which she complained bitterly of " Chesthill's forsaking her, and not paying aliment for " the children. On referring to a letter which I often " heard spoke of, Christy expressly told me the object " Chesthill had in giving her the letter, that it was to " shew to Captain Macdougall, in order to get quit of " Miss Macdougall; that Chesthill never promised, or " proposed, or even mentioned marriage to her, and " admitted she was a willing partner in the crim. con. " but for all that, she said, why should not she make use " of it to legitimatize her children, and others advised " her to do it. I told her they were her evil advisers " that did so; that she should never let such an idea " enter her mind; that to attempt to make such base " use of the letter would not avail her; that she would " be guilty of the greatest treachery and breach of " confidence if she did so, and that she should give up " the letter, or destroy it. I made use of many terms " strongly expressive of my disapprobation of her " making any other use of the letter than the purpose " she got it for, viz., to shew to Captain Macdougall,

" and as we were speaking in Gaelic, I could express " myself in this instance more forcibly than in English. " In course of conversation, Christy observed, Who had " a better right to Chesthill's property than his own " children? To which I replied, by your argument I " have no right to be here as Laird of Crossmount, for " my father, before he was married, had a child laid to " his charge by a gipsey like yourself, and by your rule " *he* should be lord and master of this house and lands; " your children may be Chesthill's, they may not, it is " easy to tell who is the mother of such children, but " always doubtful as to who is the father. Christy said " she did not want Chesthill to take her home and be " treated as a benausel, (i. e. a lady or gentleman,) but " to legitimatize her children, and do something for " herself. I said a great deal to Christy, to persuade " her not to quartel with Chesthill, and contrasted the " consequence if she failed — he would be so indignant " and disgusted with her conduct, that he would class " her children with those of the common fellows of the " country, and do nothing for them beyond what the " law provided, and allow herself to work for her bread, " perhaps beg; but if she would be advised by me, that " I would find gentlemen of landed property far richer " than myself, that would become bound that Chesthill " would give a liberal education to her children, and " put them in a way of doing for themselves, and that " he would provide handsomely for herself. In the " course of conversation, Christy told me that Chesthill " did not ask the letter from her again after it had " served its purpose, (that is, shewn to Captain Mac- " dougall) or he might have got it; it was after he " began to neglect her that he sent for it, and she " refused to give it up. Christy went away, saying, she

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" would think of all I had said to her. I have neither " seen or heard from her since that day."

As this memorandum referred to the appellant's brother, Alexander Stewart, he was allowed to be examined by her, reserving all questions as to his credibility. He swore,—" That he recollects having accom- " panied his sister, the pursuer, to Mr Stewart's of " Crossmount, four years ago: That this was in the " summer, and well on in the summer: That the " object of the deponent and his sister going to Cross- " mount, was to seek a little money from Mr Stewart: " That this was the only time he ever went to Cross- " mount with his sister: That they sought the money " for the purpose of the pursuer keeping herself and " family: That they saw Mr Stewart of Crossmount: " That they had conversation with Mr Stewart: That " it was the pursuer chiefly who spoke with him; but " the deponent also took some part in the conversation: " That the pursuer asked money; but Mr Stewart said " he had not a penny at that time: That Mr Stewart " asked the pursuer about a letter that she had from " Chesthill, (the defender:) That Mr Stewart said that " it was owing to Miss Macdougall that the pursuer " had the letter: That the pursuer said it was not, and " that she had the letter before Chesthill ever saw Miss " Macdougall. Interrogated, Whether the pursuer " told Mr Stewart that she came to consult him as to " what course she was to follow in regard to Chesthill? " Depones, That he never heard of any such statement " made in his presence. Interrogated, Whether Mr " Stewart said that he had heard that she had got the " letter to shew to Miss Macdougall's friends? Depones, " That Mr Stewart said that he had heard that she had " got the letter to keep Miss Macdougall off Chesthill.

" Interrogated, What did the pursuer say? Depones, " That the pursuer said, it was not so; that she had " the letter before Chesthill ever saw Miss Macdougall. " Interrogated, Whether the pursuer said at that inter- " view that Chesthill had or had not promised to " marry her? Depones and answers, That 'he did " 'not hear such a question either put or answered.' " That the interview lasted about a quarter of an hour " or twenty minutes, and that he was present during " the whole time of the interview, and the deponent " and the pursuer left Crossmount together. Interro- " gated, Whether he recollects of any thing else passing " than what he has above deponed to? Depones, " That he does not recollect of any thing farther. " Interrogated, Whether Crossmount said any thing " about the children being bastards? Depones, That " he does not recollect any thing that he said about it. " Interrogated, Whether he heard the pursuer say that " her children were bastards? Depones, That he did " not hear her say that they were bastards. Depones, " That he heard every word that passed at the inter- " view. Interrogated for the defender, depones, That " he was several years a herd with the late Mr Stewart; " but left his service a good many years ago. Depones, " That the conversation before deponed to took place " in a small room used by Mr Stewart as a writing- " room: That it took place in Gaelic: That he saw " Mrs Stewart that day. Depones, That he does not " recollect to have seen Mr Charles Stewart, the tutor " at Crossmount, there that day; but he has seen him " there. And the memorandum by the late Mr " Stewart having been read over to him, depones, " 'That it is not the truth altogether, nor the fifteenth " 'part of it:' And the deponent was here desired to

STEWART and others v. MENZIES. 6th Oct. 1841. Statement.

" look over the memorandum and point out what was " not true. And the memorandum having again been " read over to him sentence by sentence, and being " interrogated in reference to each sentence, Whether " it contains a correct account of the conversation? " Depones, That no part of it is true, with the excep- " tion that Mr Stewart stated, that he heard that the " letter had been got to shew to Captain Macdougall, " and that the conversation was conducted in the Gaelic " language, and that Christy did remark, ' Who had a " ' better right to Chesthill's property than his own " ' children?' Interrogated, Whether what is sworn " to in his examination in chief, as having taken place " at the interview with Mr Stewart, is the whole of " what took place? Depones, That he is sure it is; " ' there may have been words more, but it is all he " ' remembers of it.' "

The proof having been concluded, the Lord Ordinary, (Jeffrey,) on 18th December, 1835, pronounced the following interlocutor, adding the subjoined note:[1]—

---

[1] " *Note.*—The pursuer has evidently no case in the declarator without " the letter of 25th March, 1826, the separate proof of verbal acknowledg- " ments or open marital cohabitation having altogether failed. If the letter, " though delivered for the purpose it expresses, (with the continued inter- " course after its date,) does not constitute a marriage without the other " proof, it will not materially supply the defects of such proof. If it was " delivered and accepted for quite another purpose, it makes the case worse " for the pursuer than if it had never existed.

" The Lord Ordinary thinks there is, on the whole, sufficient evidence " that it was delivered and accepted for such a special and improper purpose; " and he rests his judgment on this. But he is also of opinion, that in the " circumstance of this case, where a declaration or acknowledgment of mar- " riage is conditioned on the birth of a child, and where it is certain that " there had been a great deal of personal intercourse before the letter was " delivered, the mere delivery of that letter, with proof that the intercourse " was afterwards continued, are not sufficient to constitute a marriage accord- " ing to the law of Scotland. If any reliance, indeed, is to be placed on the " report of the opinions delivered when the reclaiming note for the pursuer " was refused, on 6th December, 1833, (12, Shaw, 179,) this point was then

" The Lord Ordinary having heard parties fully on " the concluded proof, and whole cause, and made " avizandum, sustains the defences proponed against " the declaratory conclusions of the libel for marriage " and legitimacy; assoilzies the defender from the whole " of those conclusions, and decerns: And, before farther " answer, appoints the cause to be enrolled, that the " pursuer may state whether, and to what effect she

---

" deliberately decided by the Court; and though the proof was, no doubt, " declared to be before answer, and the relevancy may, therefore, in point of " form, be still open for argument, the Lord Ordinary feels that it would be " improper for any single judge, even if he had scruples as to the merits, to " go against this determination in a more advanced stage of the same cause. " He must say, however, that, looking at the whole course of decisions since " the case of Moir and M'Innes, and with reference especially to that of " M'Dewall, he cannot but concur in the principles of that determination, " though he is fully aware of the qualifications it may be thought to have " received from some of the opinions expressed in Sim v. Miles, 20th Novem- " ber, 1829, (F. C. and 6 Shaw, 89.)

" But these are truly points which never can be raised in the case, if the " Lord Ordinary is right in holding it sufficiently proved that the letter in " question never was delivered or accepted for the purpose of constituting or " proving an actual marriage, but for a very different purpose, of imposing " upon third parties by a false pretence. That this is sufficiently proved, it " is supposed would scarcely be disputed, if the evidence of Mr Stewart of " Crossmount was allowed to be competent. But a strong effort was made, " at the debate, to have his evidence set aside, as being in substance an " improper disclosure of admissions made confidentially by a party when con- " sulting and seeking advice from another, with a view to an impending " lawsuit. But though it is quite true that Mr Stewart was so consulted, " and that his situation approaches in principle to that of a law agent, where " advice is sought in similar circumstances, still the Lord Ordinary can find " no authority for extending this disqualification beyond the professional " limits within which he conceives it has hitherto been confined? And this " is less to be regretted, as the admission of this evidence only tends to con- " firm, beyond all question, what was already legally established by the " uncontradicted testimony of the two Stewarts, (uncle and aunt of the pur- " suer,) and rendered morally certain by almost all that appears, and that " does not appear on the face of the proof. There is, first of all, the admis- " sion that the letter, though bearing date in March, 1826, was not delivered " till some time in 1828. Next, there is the clear proof by the defender's " letter to the pursuer's brother, and by the depositions of Captain Macdougall " and his brother, that the letter was really prepared and delivered with a view " to impose upon these gentlemen; and, finally, there is the conclusive circum- " stance, that, from beginning to the end of her proof, and during the whole

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" means to proceed with the other or alternative con-
" clusion of her libel."

The appellants reclaimed to the Court against this interlocutor, and the Court, on the 4th February, 1836, pronounced this judgment: —

" The Lords having considered this note, with the " other proceedings, and heard counsel thereon, adhere " to the interlocutor complained of; refuse the desire " of the note, and remit to the Lord Ordinary to pro-
" ceed accordingly."

" period of her connection with the defender, there is not a vestige of evidence " of her ever having directly claimed the title or rights of a wife, or even " hinted to her confidants and relations that such was truly her condition. " She has brought forward two witnesses to swear that the defender some-
" times called her by a name which, though it properly signified nothing more " than woman, was yet often used (they say) as equivalent to that of wife. " But neither these nor any other witnesses, say they ever heard her address " the defender, or speak of him as her husband, though of the two she was " evidently the most likely to indulge in such epithets, and to hazard, in " this way, the occasional breach of a not very intelligible scheme of conceal-
" ment. There are many circumstances, also, independent of her acquies-
" cence in the baptism of the children as bastards, and in their universal " repute as such, which afford irresistible evidence of her consciousness of her " true state and condition.

" But though the case is not attended with much difficulty, when it is " considered that the pursuer was bound to make out her allegations by legal " evidence, it is impossible not to feel that there are parts of it still enveloped " in a painful obscurity, and which present but an awkward aspect for the " defender. The Lord Ordinary alludes particularly to the evidence about " the letter from Hamilton, — to the private letter from the defender himself " to his agent, of 24th August, 1828, — to the proof of his having said that " he durst not marry, and that there were people about him who prevented " him from marrying, — and to the singular tone of deep feeling and despon-
" dency in his letter to the clergyman of 15th June, 1827, which is much " more like that of a man committed to an unsuitable and disreputable mar-
" riage, than of a young Highland officer, who finds himself the father of an " illegitimate child. It is plainly impossible, however, to hold these as proofs " of an actual marriage, and the indications of kindness to her relations, " which were quite as likely to flow from the influence of a favourite mistress, " as of an humble wife, are of still less importance.

" The Lord Ordinary scarcely supposes that the pursuer means to insist in " her claim of damages, as for seduction. F. J."

On the 14th May, 1836, the Lord Ordinary pronounced the following interlocutor: —

"The Lord Ordinary having considered the foregoing remit from the Inner House, in respect it is stated that it is not the intention of the pursuer, Mrs Christian Stewart or Menzies, to appeal against the judgment, assoilzieing the defender from the declaratory conclusions of the libel for marriage and legitimacy, appoints parties' procurators to be ready to debate at next calling on the alternative conclusion of the summons for damages."

The appellant, Christian Stewart, then moved the Lord Ordinary that he should order an additional record to be made up with a view to the alternative conclusion of the summons for damages on the ground of seduction, and also that the case should be remitted to a jury, with a view to try the question.

On the 31st May, 1836, the Lord Ordinary pronounced the following interlocutor, and added the subjoined note[1]: —

---

[1] "*Note.* — There is more authority than the Lord Ordinary (looking at the terms of the Judicature Act) could have expected, for allowing a record regularly closed in this Court to be opened up, or added to, though it does not clearly appear whether, in all these cases, this was not done substantially of consent; at least not in spite of the opposition, or in face of a plea of incompetency seriously maintained by an adverse party. For the reasons stated in the interlocutor, however, this is conceived very clearly to be a case not fit to be added to those exceptions from the rule of the statute, independently altogether of the peremptory renitentia of the defender.

"As to the suggestion that the case should now go to a Jury, there is no doubt that a separate and independent action of damages for seduction must have gone to that tribunal; and that it is in itself the fittest and best tribunal both for deciding whether damages are due, and especially for assessing their amount. But besides the reasons stated in the interlocutor, which seem legally conclusive, it is to be considered, that even on a view of mere equity and expediency, such a course would be liable to great practical objections. The pursuer by no means proposes to lay aside the witnesses

Stewart and others v. Menzies.

6th Oct. 1841.

Statement.

"The Lord Ordinary having heard parties' procurators, on the motion of the pursuer, Christian Stewart, to have a new or additional record made up on the remaining conclusions of her summons for damages on account of seduction, and also to have the cause remitted to the jury roll, with a view to the justice and extent of her claim for such damages being determined by a verdict; and having made avisandum with the debate and whole process, in respect that the existing record was made up on the whole process, and embraces both the alternative conclusions thereof, that there is no allegation of res noviter veniens ad notitiam, and that it is clearly competent for the pursuer to prove her alleged seduction, under the record as it stands, refuses to allow any new or additional record now to be made up, or to report to the Lords of the Second Division, with a view to making up such a record; and in respect that the process libelled alternatively, as the pursuer chose to libel it, was a proper consistorial cause, and must have gone to the Commissaries while that Court subsisted, for decision on both alternatives; that the original interlocutor of the former Lord Ordinary, (8th March, 1833,) remitting to the Commissaries 'to

---

"already examined, and the documents already produced under the interim report of the commissaries. But she wants to enlarge and add to the proof she has thus already obtained, to re-examine before the Jury such of the surviving witnesses as she may select, and to read at her pleasure from the depositions of those who are dead, and to produce de novo the writings already recovered, together with any other she may still be able to make furthcoming; in short, to use the proof taken by the Commissaries, under the general remit already noticed, as a precognition for a Jury trial upon one branch of the cause then generally remitted to the Commissaries for probation, and partly proved in relation to this branch as well as the other.

"It is needless to point out the hazards and abuses to which such a course of proceeding must be liable; and the Lord Ordinary is not aware that it as ever been sanctioned."

" 'take the proof of the parties,' necessarily imported " a remit to take their proof upon both the said alter- " native conclusions, and that it appears to have been " so held and understood by the pursuer herself, inas- " much as the report (or interim report) of the proof " by the Commissary, (3d July, 1835,) proceeds upon " a minute by the pursuer, in which it is stated that she " had now closed her parole proof, only 'in so far as " 'the conclusions applicable to marriage were con- " 'cerned,' and craved that the proof, as it stood, might " then be reported accordingly; and in respect also, " that in her reclaiming note against the said inter- " locutor of 8th March, 1833, the pursuer prayed " specially, that in the event of the defender's allega- " tions being found relevant, 'the process should be " 'remitted to the Jury Court instead of the Commis- " 'saries,' and that this reclaiming note was refused by " an interlocutor long ago final: Finds, that it is not " now competent to send this case to a jury, and that " the pursuer can only be let into any additional proof " she may be entitled to offer, on the ground of " seduction, under a renewal of the remit to the " Commissaries, or a commission to some other proper " persons."

Against this interlocutor the appellants reclaimed to the Inner House, who, on the 5th July, 1836, pronounced the following judgment:—" The Lords having " considered this note with the other proceedings, and " heard counsel thereon, adhere to the interlocutor " complained of, and refuse the desire of the note."

Thereafter, on 7th July, 1836, the Lord Ordinary pronounced the following interlocutor:—" The Lord " Ordinary allows the pursuer, Mrs Christian Stewart, " a proof of the libel, quoad the conclusion of damages

Stewart and others v. Menzies. 6th Oct. 1841. Statement.

" for seduction, and the defender a conjunct probation, " and remits to the Commissaries, or any one of them, " to take the proof with the usual powers; grants " warrant for letters of incident diligence, at the " instance of both or either party against witnesses and " havers, and that any lawful day betwixt and the third " sederunt-day in November next, to be then reported " to the Lord Ordinary. Ten days' previous notice " being given by the one party to the other previous to " leading the proof."

Condie, a haver, examined by the appellant, produced a letter written by the respondent to the clergyman of the parish where his family residence was, in these terms: —

" *York Barracks*, 15th June, 1827.

" My dear Sir, — I was never more surprised, since " ever I came into this world, than I was when I got " your letter yesterday morning. I am so annoyed and " hurt at the business altogether, that I can scarcely " say or tell you any thing. I wish the child to be " baptized as soon as possible; and I have asked R. " Black to be my sponsor. I will pay all the fines and " things that are requisite, by your letting me know, " as soon as possible, all the different things and fines, " and what would be the amount expected. I beg of " you not to bring her before any session, or thing of " that kind, as I was myself the transgressor. I have " sent my servant home, to see and settle every thing " the best way he can, as it is not in my power to get " away myself from here; and another thing, that I " have not courage to face all my neighbours and rela- " tions again; so this business has caused a separation " between I and my country for ever; so don't be at all " in doubt, for I am really serious.

" I thank God that I am not at home, and hope " never to have it in my power to say that I have seen " the young lady. I intend to remove them in a short " time till the child is nursed, and shall then board her " for her lifetime, with any person who will take any " charge of her. I feel for the poor woman more than " it is in my power to mention, when I think of the " mischief I have done in destroying her character for " ever; for my own, it was lost long ago.

" I wish you to write me as soon as you can, all the " particulars, and let the baptism be as quiet and con- " cealed as you can possibly make it. I wish you and " all your's health and happiness; and also every per- " son around you, as I have never again a chance of " seeing you in the Highlands. Remember me likewise " to all at Glenlyon House and Druimachary, and " believe me ever to remain, my dear Sir, yours most " sincerely.

" P.S. — I wish the child to be called Katherine " Stewart, not Menzies at all."

The appellant produced another letter, written by the respondent to herself, but without a date, which was in these terms: —

" Dear Christy, — I am sorry that I cannot be able " to go to see you to-night; but I send you a letter " which I had been intending to do long ago, and " before I ever expected or understood that you were " again with child, a circumstance which I can assure " you, gives me most distressing ideas, as I am alone the " person to blame, and on whom, I trust, all the blame " will be laid. I have every inclination and feeling to " take you to myself; but there are just two things to " be considered, one is, that all my respectability and " connection with my equals will be at an end; and

Stewart and others v. Menzies. 6th Oct. 1841. Statement.

"another, that I will lose all the respectability which "my inferiors at this time pay to me; but that won't "be a sufficient excuse for my destroying you. I now "begin to enter on the circumstances of the case more "minutely. I wish you (if you possibly can) to leave "this country for a time, say till you are delivered, and "then to get some of your relations, say those you are "staying with at present, to go to some other property "away from my own, where they will be as comfortable "as they are at present, and on these terms, and also "your giving me Catherine to myself, I will settle on "you the sum of L.60 per year during the first ten "years of your life; and for the remainder of the whole "of your life, I will settle the sum of L.50, and L.400 "to the two children at my death. This I will have "drawn out on a stamped paper if you choose, with "any two people you may choose to take the manage-"ment of it. The annuity will be made payable at "Martinmas and Whitsunday, L.30 each time. I now "most sincerely hope that this will come to your "wishes, as I declare that I will be most happy to act "towards you the best way I am able, for no one knows "what I am due to you, except your brother Donald, "and your uncle James, regarding that business of "Miss Macdougall's, which is now settled.

"Report says that I am now to be married to "another, which I dare say may hurt you; but I "declare not a word of it is true; and even though I "were anxious, I dare not marry for four years to "come, from the settlement which has been made "between Captain Macdougall and myself. You will "also be aware that it would hurt my father very much "if I was to marry you at this moment. I will be west "to see you I hope to-morrow, and then you will be

" able to tell what you think of what I have said in " this letter. I remain, yours most sincerely,

(Signed) " JOHN MENZIES."

" P.S. — I forgot to mention, that whatever house " you will get to live in, if you leave this country, I " will furnish it to you myself, and let you have any " two of my cows you may wish for, or any kind you " should like. (Intd.) J. M.

" I will see you to-morrow, and you can tell me " every thing then."

And in support of this branch of the case as to seduction, she farther relied on the evidence of Robert Stewart, who swore, — " That he has resided for a long " time at Foss, and is acquainted with the family of the " pursuer: That the pursuer's father was a farmer at " Rannoch, and afterwards at Foss. Interrogated, " Whether he was a respectable person? Depones, " That he never heard any thing against him. Inter- " rogated, Whether he was a person of character, credit, " and reputation in the country? Depones, That he " was. Interrogated, depones, That he knew the pur- " suer when at Foss. Interrogated, Whether she was " much liked when there? Depones, and answers, " 'Yes; I think she was. I never heard any thing " 'against her.' Depones, That at the death of the " pursuer's father the family were young. Depones, " That it is common in that part of the country where " the pursuer's father lived, for the daughters of far- " mers to go into service."

Another person of the same name also swore, — " That he has been the most of his days a residenter on " the estate of Foss, and he had occasion to be fre- " quently about the house of Foss, having been em- " ployed as a shoemaker by the proprietor, family and

Stewart and others v. Menzies. 6th Oct. 1841. Statement.

"servants: That he had occasion to know the pursuer "when she was there. Depones, That the deponent "knows that she was very much respected, and very "much thought of by the family and by the whole "country. Depones, That the deponent had occasion "at that time to see the defender frequently about the "house, and the defender and the pursuer together: "That the deponent saw the defender and the pursuer "whispering together, and sometimes saw him throw "his arm round the pursuer's neck: That they seemed "very fond of each other: That the deponent never "saw any thing improper pass betwixt them. And "being interrogated, Whether the defender seemed to "treat her respectfully? Depones, That he does not "know as to that. Interrogated, What he means by "saying that he does not know as to that? Depones "and answers, 'I did not hear what they were saying "to one another.' Depones, That this happened before "the pursuer left Foss to go to Duneaves: That the "deponent observed these things for a considerable "time before he left Foss: That it was a twelvemonth "at least: That it might be a year and a half. Inter-"rogated for the defender, Whether he remembers any "particular occasion on which he saw Mr Menzies "whispering with the pursuer, or throwing his arms "round her neck? Depones, That he does not. De-"pones, That on the occasions on which Mr Menzies "acted as above deponed to, the other servants were "present."

On the 1st of February, 1837, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:[1]—

---

[1] "*Note.*—There is no direct evidence (for what Robert Stewart depones at "pp. 24 and 25 of the pursuer's proof, can scarcely be considered as an

"The Lord Ordinary having heard the counsel for "the parties on the concluded proof, as to the remain- "ing or alternative conclusions of the summons, under "which the pursuer claims damages on the ground of "seduction, and made avizandum, finds that there is no

---

"exception) as to the nature of the intercourse between the parties, or their "behaviour to each other, prior to the time when an illicit connection must "(at the very latest) have begun, viz., about nine months previous to the "birth of the first child in June, 1827; and all the pursuer has to found "upon in relation to this most important period, is, that as she had been by "this time about eighteen months in the defender's family, it is to be pre- "sumed that she had all that time resisted his solicitations. But as this "assumes, without any intelligible ground, that he had begun his solicitations "as soon as she entered his house, it is obvious that no regard whatever can "be paid to such a vague and gratuitous surmise.

"The whole case, in short, depends on two admitted letters of the "defender, one addressed to the clergyman of the parish, on occasion of the "birth of the first child, and dated 15th June, 1827; the other, and by far "the most important, to the pursuer herself, without any date, but proved, by "its contents, to have been written during her second pregnancy, and some "time in spring, 1829. Both these letters, the pursuer contends, contain "admissions of seduction on the part of the defender, and of his consequent "obligation to make her reparation for the injury she had consequently sus- "tained; and the last of them also contains clear traces of a purpose of mar- "riage, and indications that such a connection had been long contemplated "by both of them, which, she says, she is entitled to draw back to the period "of their first intercourse, and to assume as the cause of her yielding.

"It is impossible to deny that the tenor of these documents gives a certain "colour to those allegations, and gives the case somewhat of a painful "character, in respect to the defender. But the Lord Ordinary, though he "cannot but regret that this part of the cause could not be sent to the appro- "priate tribunal of a Jury, has not felt that he should be justified in finding "upon this evidence alone that a case of seduction had been made out.

"The defender's general expressions of self-condemnation, and of his deep "feeling for the ruin and misery he had brought upon the pursuer, though "stronger than are usual, or perhaps natural in a case of mutual transgression, "do not necessarily infer that he was conscious of any thing which our law "would consider as seduction; that is, any artful practices, or false insinua- "tions, held out to entrap a resolute chastity;—any deliberate plan to cor- "rupt the principles or inflame the passions of an inexperienced female; or "even any long and persevering solicitations after repeated repulse and resis- "tance. In almost every case where a young woman gives way, in this sort, "to temptation, the man is the aggressor, and in fact, as well as in morality, "decidedly the most to blame; while, in every case almost without exception "the woman is incomparably the greatest sufferer. Yet it would be of peril- "ous example to hold that every woman, upon her first lapse from virtue,

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

" sufficient proof to warrant such a conclusion, and " therefore sustains the defences, assoilzies the defender " from this conclusion also of the Summons, and " decerns, but finds no expenses due."

" should be entitled to recover damages as for seduction, from her paramour. " But if this could not be allowed, it would scarcely be less perilous to hold " the feeling expression of these undoubted truths as evidence against the " supposed seducer; and there is really no more in the expressions now " referred to.

" In the second letter, however, there are no doubt references to a matri- " monial purpose, evidently not then for the first time brought into discussion " between the parties; and not even then finally disclaimed or abandoned " by the defender. It is here alone that the Lord Ordinary has had any " difficulty; and if this letter had been dated previous to the first connection, " or even very soon after it, he would have been inclined to hold that it gave " a character to the intercourse which might have justified the present claim " of the pursuer. The great inequality of rank on which the defender chiefly " insists, as excluding the presumption of these insinuations of intended mar- " riage which have formed the chief indicia of seduction in most of the " decided cases, would have become of no consequence whatever, if there had " been such proof of actual matrimonial communings, as the Lord Ordinary " thinks would certainly have been afforded by a letter of this strain, in the " beginning of the intimacy, and connected, as it then would have been with " the self-accusations already referred to, might have been quite sufficient to " infer a full liability for the consequences of the pursuer's too implicit reli- " ance on those insinuations. The difficulty, however, is in the dates; in " the long interval between the time when their matrimonial contemplations " may have originated, and the time when the pursuer yielded either to the " mere request or to the artful seduction of the defender. In that interval " she had become the mother of one of his children, and was about to give " birth to another; she had entered into a state of regular concubinage with " him; and had become an object of more constant and respectful attention " than there is any proof of her having been before she had submitted to his " desires. It is believed to be far more common for men of affectionate " natures to take up purposes of marriage with the mothers of their illegiti- " mate children, towards whom they had not previously entertained, or pro- " fessed any such purpose, than for men of any description to seduce women " of inferior rank, by false expectations of marriage; and therefore, when the " only proofs of such purposes are dated subsequent to the birth of children, " the Lord Ordinary thinks he is bound to conclude ex eo quod plerumque " fit, and to hold that they do not amount to evidence of antecedent induce- " ments held out to give effect to amorous solicitations.

" It is upon this ground that the Lord Ordinary rejects the claim of the " pursuer. He is not at all moved by the reference in the second letter, to " the trick upon Miss Macdougall, to which she consented to be an accessory, " but of which the discredit is chiefly with the defender, or by his sugges- " tion; that the matrimonial indications in that letter may have been

STEWART and others v. MENZIES.

6th Oct. 1841.

Statement.

The appellant reclaimed against this interlocutor, and on the 27th June, 1837, the Court pronounced the following judgment: — "The Lords having considered "this note, with the other proceedings, and heard "counsel thereon, adhere to the interlocutor complained "of, and refuse the desire of the Note."

The opinions of the Judges at delivering this interlocutor will be found 11 F. C. 347.

The appeal was taken against these different interlocutors of the Lord Ordinary and Court.

Appellant's Argument.

The Appellant. — I. The letter of 26th March, 1826, is twofold; it first contains an acknowledgment of marriage, or an already existing connection as man and wife; and second, a promise to declare the connection in case of the birth of a child. But assuming it not to amount to more than a promise of marriage, coupled with sub-

---

"dictated, rather by gratitude for her services in that unworthy transaction, "than by any original attachment. The whole strain and tone of the letter "are exclusive of such a supposition. Neither could he think of depriving "the pursuer of her right to reparation, if there was good evidence of her "seduction, on account of her improper conduct in suppressing the letter now "alluded to, during the discussion of the declaratory conclusions of the libel; "unless it was proved that she had acquiesced in the statements of that "letter, the mere receipt and custody of it might not put her in mala fide to "insist in that declarator. But whatever her fault might be in that parti-"cular, it could never afford a legal set off against a just debt contracted to "her by the defender's delinquency, any more than against such a debt con-"tracted by his regular deed or agreement, not to insist upon the obvious "fact, that he was himself a party to the suppression of this letter during "that discussion, and seems to have been willing enough to lose the benefit "of it in the declarator, for the chance of its not being forthcoming in the "alternative conclusion for damages.

"The Lord Ordinary has no wish to encourage farther litigation in this "painful case, but he thinks that the defender, after writing these letters, is "not justified in casting this young woman on the world without some pro-"vision. There may be a defence of turpis causa, if the intercourse continued "after the date of the last letter, but if it then terminated, he does not see "why action should not lie for the provisions there stipulated; at all events, "he has no idea of allowing any expenses in this process. F. J."

STEWART and others v. MENZIES.

6th Oct. 1841.

Appellant's Argument.

sequent cohabitation, it is sufficient to constitute a marriage. It was dated in 1826, but was not delivered till 1828. Betwixt these years there had been an intermission in the connection between the parties, during which both parties had repented. Connection was resumed on the faith of the delivery of the letter, at a time when the condition contained in it had been already purified by the birth of the first child; the promise, therefore, with subsequent cohabitation, gave all the requisites to constitute marriage, for there is no rule that prior cohabitation destroys the effect of a promise, with subsequent copula. Ersk. I. 6. 4; Mill v. Sim, 5 F. C. 84.

[*Lord Chancellor.* In 1826, the letter was a promise, coupled with a condition.]

If you take it as it stands.

[*Lord Chancellor.* Do you put your case higher than if the letter had been delivered in 1826?]

Yes. It must be held as delivered in 1828.

[*Lord Chancellor.* Suppose no child had been born after the delivery.]

The condition had been purified before the delivery, and there is neither averment nor evidence that carnal connection had been resumed before the letter was delivered. Besides, copula following, the condition is presumed to have been purified. Stair, IV. 45. 19; Shillinglaw v. M'Intosh, 7 S. 722. At all events, the condition was purified by the subsequent birth of the second child. In another view, the first part of the letter contained an acknowledgment of marriage, and the second, being intended to suspend the effect of the first for an illegal purpose, must be altogether disregarded.

II. There is no averment that the letter was obtained

by force or fraud; parole evidence, therefore, either to control its terms, in themselves perfectly unambiguous, or to disclose an intention of the party at writing different from what the terms of the writing exhibit, was inadmissible. Watt v. M'Farlane, 15th February, 1828, 6 S. 556; Gibb v. Winning, 28th May, 1829, 7 S. 677, Ersk. IV. 2. 21. In the case of Innes v. Moir, Mor. 12683, the terms of the letter were inconsistent with, and contradictory in some respects of, the purpose for which it was used; it was necessary to have the judicial examination of the party himself to support the document, but the examination negatived the purpose for which the letter was used, and imputed it to one totally different; and the judgment proceeded specially upon the ground, that the transaction had not been proved without the examination, and that the examination gave it another colour. But it is said there is an admission that the letter in the present case was not delivered of the date it bears, and that this is sufficient to let in parole testimony; if so, the admission must be taken with its qualifications, and these support the use which the appellant makes of the document. Innes v. Moir, ut supra; Gray, 8 S. 221; Grierson, 8 S. 317. But moreover, the parole testimony offered by the respondent was farther incompetent, by reason it was offered to establish his own fraud, and to his own benefit, M'Ghie, 7 Shaw, 797; and in contradiction of his own statement, in his letter to Mr Sharpe, of 24th August, 1828.

III. Though the evidence of near relations be in the general case inadmissible, clandestine and secret marriage forms one of the exceptions to the rule, for near relatives are the natural depositaries of such a secret, and to exclude their evidence would, in most cases, be to

STEWART and others v. MENZIES. 6th Oct. 1841. Appellant's Argument.

exclude evidence of the truth. Barber v. Stewart, Mor. 16742; Young v. Arrot, Mor. 16743; Cameron v. Malcolm, Mor. 12680; Nicolson v. Nicolson, Mor. 16774; Martin v. M'Kisson, 8th February, 1816, 19 F. C. 76. The relationship may be an objection to the credibility, but it is not any to the admissibility of a witness in such a case.

IV. The 6 Geo. IV. cap. 120, sec. 38, shews, that it was the intention of the legislature, that actions of damages for breach of promise of marriage and seduction, should be tried by Jury, as the tribunal best fitted to inquire into the facts, and assess the damages. The conjunction of the declarator of marriage with the claim for damages was according to long established usage. But the statements on the record were necessarily limited to support the conclusion for declarator only. When the declaratory conclusions, therefore, were disposed of, the Court should have allowed a new record to be prepared as to the remaining conclusion, and remitted it for trial by Jury. The refusal of the Court to remit for trial by Jury at an early stage of the case, applied to the trial of the declaratory conclusions, which certainly were not triable in that form.

V. If the Court properly reserved to itself the decision of the claim for damages, their judgment was contrary to the evidence. The two Robert Stewarts established the respectability of the appellant, previous to entering the respondent's service; and his own pleadings, and his letter to the appellant and the clergyman of the parish, proved that the appellant had become the victim of his seduction, and that he had exhibited the strongest feelings of contrition and self-reproach for the injury he had done her.

The Respondent. — I. Present consent is necessary to marriage, and matrimony must be the object of it. Consent for the purpose of fornication can never be perfected into marriage. Thomas, 7 S. 872. In such a case the presumption of consent to marry at the moment of copula is necessarily excluded, and without such consent there cannot be marriage. Ersk. I. 6, 4; Stair, I. 1, 6; Macdowall v. M'Dowall; Ferg. 163; Cameron v. Malcolm, Mor. 12680; M'Gregor v. Jolly, 3 W. and S. 85. The letter of 25th March, 1826, has none of the expressions which, if intended to acknowledge a subsisting marriage, it would certainly have contained, and is addressed to the appellant in her own maiden name, and it is admitted that it was not delivered until the close of 1827, or beginning of 1828, plainly excluding any notion of matrimonial consent having been interchanged at the date of the letter. Viewing it, on the other hand, as a promise of marriage, its effect was dependent on a condition which might, or might not, have been purified, leaving the status of the parties uncertain until that should be ascertained; this is necessarily to exclude any presumption of present unqualified consent, which by the law of Scotland has always been considered necessary. M'Innes v. More, 10 S. and D. 590. The condition involved an agreement to live for a time at least in a state of concubinage, it was therefore illegal, and could never be purified so as to perfect the promise. Bell's Dig. 206; Ersk. III. 3, 83.

II. But the letter was given with another intent than that of marriage, and evidence to shew this was properly admitted. Though it is no doubt incompetent to admit parole testimony to explain or derogate from the terms

STEWART and others v MENZIES.

6th Oct. 1841.

Respondent's Argument.

of a written contract, yet it is perfectly competent to admit such evidence to shew that the document was no contract at all. M'Innes v. More, ut supra; Taylor v. Kello, Mor. 12687; M'Lauchlan v. Dobson, Mor. 12693; Grant v. Mennons, Ferg. App. p. 110. The evidence of the two M'Dougalls, and of the memorandum by Mr Stewart, establishes that the letter was given for the purpose of imposition upon another, and with no other intention, but without any purpose of injury to the appellant; it was perfectly competent therefore, for the respondent to lead evidence of the true intention, though it were fraud, the fraud being upon another person than the appellant. M'Innes v. More, ut supra; Sassen v. Campbell, 5 W. and S. 309; M'Gregor v. Jolly, 3 W. and S. 130.

III. There was not any penuria testium, which alone could have made the evidence of the near relatives admissible. The allegations of the summons negatived such a supposition. Besides, the penuria must be unavoidable, from the nature of the case, and the situation of the parties, or be occasioned by the opposite party. But here sixteen witnesses had been examined, shewing that there was not in fact any penuria; there was no evidence that the respondent had done any thing to circumscribe the means of proof; neither were the facts of the case such as to justify the belief, that there could be any scantiness of evidence. This evidence was therefore properly rejected. Dalziel v. Richmond, Mor. 16780; Bell v. King, Mor. 16786; Laing, 16th Nov. 1814, 18 F. C. 22; Manuel v. Fraser, 1 Murray, 391; Brown v. Wintours, 2 Murr. 455; Gibsons v. Marr, 3 Murr. 263; Anderson v. Jeffrey, 4 Murr. 105; Dougall v. Dougall, 11 Shaw, 1020. In Craigie v.

Hoggan, 15 Dunlop, 379, a father and sister were admitted as witnesses, because the defender had destroyed the documentary evidence, and while he had enjoined secrecy as to all others, he had permitted disclosure to these relations alone.

IV. By 1 W. IV. c. 69, sec. 37, consistorial causes are specially excepted from trial by Jury. It was competent for the appellant to have separated her causes of action, and to have made the claim for damages in an action which could competently have been triable before a Jury. She chose, however, to join the two together, and to prepare and close the record; and in her reclaiming note against the admissibility of the evidence tendered by the respondent, she prayed, that in the event of the respondent's averments being admitted to proof, the cause should be remitted to the Jury Court. This note was refused, and the interlocutor refusing it has not been appealed from.

V. There is evidence of illicit connection between the parties, but none of those qualities in the commencement of that connection, which would be necessary to support a claim for damages, by reason of seduction. There is no evidence whatever that the appellant's virtue yielded to the fraudulent contrivances of the respondent, and that she was not as much the tempter as the tempted, quod volenti non fit injuriam, and their relative situations in life were not such as to raise any presumption of this kind.

LORD COTTENHAM. — My Lords, a considerable portion of the voluminous papers in this case is occupied in the discussion of a question raised by the appellant,

STEWART and others v. MENZIES.

6th Oct. 1841.

Ld. Chancellor's Speech.

which was most properly abandoned at the bar of this House, by the eminent counsel who appeared for the appellant. The point discussed in the papers, and abandoned at the bar, was, that it was not competent for the respondent to adduce evidence to shew the circumstances under which, and the purposes for which, the letter dated 25th March, 1826, was written and delivered to the appellant. This point was attempted to be supported by reference to a principle to which it has no application, and in the face of several authorities. It is unnecessary farther to notice this point.

The main question, which is that of the status of the appellant, whether she is to be considered as the wife of the respondent, turns principally upon the effect of the letter of the 25th of March, 1826, with reference to the law of Scotland upon the subject of mariage, first taken per se, and secondly, taken with reference to the facts proved.

It is an admitted fact, that cohabitation preceded and followed the date of that letter, and the time at which it is admitted to have been delivered to the appellant. The letter is dated 25th March, 1826, and is in these words, — "Christy, You and I having lived together as "man and wife for some time, I hereby declare you to "be my lawful wife, in the event of a child being born "in consequence of the present connection betwixt us. "I am yours truly, John Menzies." The summons puts the alleged marriage upon two grounds, — 1st, A promise of marriage previous to any cohabitation cum subsequente copula, of which no proof was given; and 2d, Upon this letter, as being an acknowledgment and declaration of the marriage; but it does not put the case upon this letter as being a promise to marry, cum subsequente copula. Consent de presenti is essential to

marriage, and marriages established upon a promise cum subsequente copula are so established upon a fiction that the consent de presenti was mutually given by the parties in consequence of the anterior promise; but if the promise be conditional upon the happening of a future event, there is no room for any such fiction, the copula cannot be the perfection or consummation of the prior contract. Neither can this letter constitute a marriage by consent. It is not an acceptance by the parties of each other for their lawful spouses. By contemplating a future status of marriage upon a certain event happening, it negatives all the essentials of a marriage by consent expressed. Neither can it be considered as a declaration constituting habit and repute, as shewing that the cohabitation was that of husband and wife. The contemplation of such a relationship arising upon the happening of a future event, negatives the habit and repute which it is referred to as proving. It did not require the cases of Macdonald v. Macdonald, and M'Innes v. Moir, to prove this.

The letter, therefore, taken per se, does not support any of the grounds upon which a Scotch marriage can be supported. The very able counsel for the appellant felt this so strongly, that he rested his client's case principally upon this, that the letter, though dated in 1826, was not delivered to the appellant till late in 1827, or early in 1828, after the birth of the child, and therefore ought to be considered as a positive declaration of present marriage, the condition having at that time been performed. This would, indeed, be doing what the appellant properly insisted cannot be done, that is, construing a written document by extraneous evidence of intention. But if the fact of the letter not having been delivered till 1828 be resorted to, so must all the other

STEWART and others v. MENZIES.

6th Oct. 1841.

Ld. Chancellor's Speech.

evidence connected with the same matter, and which proves the reason for its having been delivered at that time with the date of 1826, and the purpose for which it was so delivered; and which evidence so resorted to, and which it is now not in dispute was legally admissible, amply proves, that the parties did not intend that the letter should constitute a present marriage, or operate as a promise of marriage, but that it was written in pursuance of a scheme of the respondent, acquiesced in by the appellant, to commit a fraud upon a third person. The cases of Kennedy v. Campbell, in 3 W. S. 135; M'Innes v. Moir, in Ferguson's Reports, App. 125, 128; Taylor v. Kello, Mor. 12687; Grant v. Mennons, Ferguson, 110, and many other cases, prove what indeed required no such proof, that to constitute a contract of marriage, there must be contracting parties, and that the expressions used, though of themselves sufficient words of contract, are of no avail if not intended by the parties to have that effect, but are used for some collateral purpose. This in no respect infringes upon the principle of not construing a written contract by extrinsic evidence of intention, the question being, not what the written contract imports, but whether it is to be treated as a contract at all. I have already observed, that in order to construe the letter dated in 1826, according to the circumstances which existed at the time it was delivered in 1828, extrinsic evidence must be resorted to; but that proves that the parties must have had some design in antedating the letter. To construe it, therefore, as if dated in 1828, would be to defeat the proved object of the parties, and to construe a written document distinctly expressing one purpose, as importing one totally different, upon evidence dehors the instrument itself, and that not proving such to have been

the intention of the parties, but that their intention was, that the letter should be construed according to the literal terms used, that is a promise made in 1826, subsequently consummated by the birth of a child, and therefore, as they supposed, in point of form binding. This alone would have answered the purpose of imposing upon the third party. The position, therefore, attempted to be maintained by the learned counsel for the appellant, is wholly untenable.

If, then, this letter be inoperative for the purpose of constituting or proving a marriage, the case of the pursuer fails altogether. There is no other evidence deserving of observation, and the other points in the case are of no difficulty. The rejection of the evidence of the pursuers' near relations, according to the law as it then stood, was clearly right, and there is no reason to suppose that their evidence, if given, and believed, would have benefited the pursuer, seeing what was the real history of the transaction is proved by unquestionable evidence. The course adopted with respect to the conclusion for damages upon the alleged seduction, was also I think, strictly proper; the pursuer had a choice of proceeding at once in an action for that purpose, in which case, the Jury would have been the constituted tribunal to try the question; but she chose to conjoin the claim for damages with the action of declarator of marriage, and after proofs in such suit, complains of the Court assuming jurisdiction, as to the case of seduction. The evidence does not establish a case of seduction; it proves, indeed, conduct in the defender highly discreditable, as it leaves no doubt of his having been a party at least to the ruin of the pursuer, whom, as being in his service, he was in honour bound to protect; but that by no means establishes per se a title to damages for

STEWART and others v. MENZIES.

6th Oct. 1841.

Ld. Chancellor's Speech.

seduction, and the time during which the intercourse continued without complaint, is an important feature in a question of this kind.

For these reasons, I have no hesitation in advising your Lordships to affirm the interlocutors appealed from. A question important, I fear, to the pursuer, remains to be considered, the costs of the appeal; looking at the conduct of the defender throughout the transaction in evidence, and particularly to his treatment of the woman he had ruined, and the children she had borne to him, and the probably distressed circumstances of the appellant, I should have been glad to have found grounds, upon which I could have advised your Lordships not to fix upon the appellant the costs of this appeal. Such reasons probably operated upon the Court below, in refusing to the defender the expenses of the suit; but it is, I fear, to the practice as to costs in this House, having formerly been so imperfect and uncertain, that the number of frivolous appeals, particularly from Scotland, is to be attributed. Nothing can be more important to the interests of suitors, than to discourage such expensive and useless litigation. It has, I have reason to hope, been much checked of late years, by the altered system as to costs, and I have always felt it my duty, in considering the question of costs, in each particular case to look to the effect which the course to be adopted might have upon this general question; and in this House, and in the Court of Chancery, I have thought that benefit would arise from adhering more closely than had been done by some of my predecessors, to the principle of making the question of costs follow the result of the suit upon the merits, particularly when the question depended upon matters of fact, and the conduct of parties. I have been assured, and I have

reason to believe, that this course has materially checked useless litigation. Acting upon this principle, although I think that the respondent will acquire some redeeming credit by not exacting costs from the appellant, I cannot do otherwise than propose to your lordships to affirm the interlocutors appealed from, with costs.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend in this case, which I heard the greater part of with him. It is a case subject to the observations which he has made, and it is therefore with some reluctance that I have come to the conclusion I have arrived at.

Judgment.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed.

ALEX. DOBIE — RICHARDSON and CONNELL, Agents.

Stanford Law Library
3 6105 063 102 375